Office-Supreme Court, U.S.
FILED
JUL 1 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-8

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1980

DOROTHY BROWN
Petitioner

-vs-

UNITED STATES OF AMERICA
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether the documentary evidence introduced against Petitioner should have been suppressed because it was obtained under a general warrant, in violation of the Fourth Amendment.

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DORTHY BROWN
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vs.

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*Respondent**

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner Dorothy Brown prays for issuance of a writ of certiorari to review the Judgment and Order of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on May 5, 1981.

OPINIONS BELOW

The Decision of the United States Court of Appeals for the Sixth Circuit is an unpublished Order entered May 5, 1981 (1a)**.

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* The caption contains the names of all the parties to the proceedings in the Court of Appeals. William J. Brown, DPM, was also a defendant in the proceedings in the District Court.

** Parenthetical number references are to pages in the Appendix.

The sentence of the District Court was entered June 13, 1980 (50a), upon a jury verdict entered on April 25, 1980. Opinions of the District Court denying motions to supress evidence were entered on February 28, 1980, and April 22, 1980 9a, 11a).

A decision of the District Court in a related civil case brought pursuant to Federal Rule of Criminal Procedure 41(e) was entered on May 24, 1978 (2a, 8a).

CONCISE STATEMENT OF JURISDICTION

The Supreme Court has jurisdiction to hear this case on certiorari under 28 U.S.C. §1254(1). A written Order was issued by the United States Court of Appeals for the Sixth Circuit on May 5, 1981 (1a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the Constitution of the United States and 18 U.S.C. §§2(a), 287, 1001 and 1341 are reprinted in the Appendix at pages 83a through 88a.

CONCISE STATEMENT OF THE CASE

On Feburary 23, 1978, a search warrant issued by a U.S. Magistrate was executed on the office of William J. Brown, D.P.M. (20a, 22a). The warrant directed the seizure of:

> "Records, books and accounts pertaining to the following:
>
> Patient Medical Charts
> Daily Log sheets—'Day Sheets'
> Patient ledger sheets
> Insurance claim forms
>
> which are in violation of Title 18, United States Code, Section 1001[.]"

The search warrant affiant was the government's chief investigator, Deirdre Flannery-Tenaka (17a, 63a, 64a), an investigator for the Department of Health, Education and Welfare. She began her investigation in November of 1976 (63a) a half a year after she was assigned the case (63a).

Ms. Flannery's affidavit related allegations of three former patients and two former employees of Dr. Brown. The affidavit said that one patient told Ms. Flannery that in 1975 she complained to the Social Security office about five Medicare claims submitted by Dr. Brown's office for services not received. Another former patient told Ms. Flannery that at an unspecified time, Dr. Brown billed Medicare for the removal of five toenails when work was done on only four. The third former patient told the affiant that in 1975, Dr. Brown made a claim to an unspecified person or agency for three injections the patient said he never received. The two former employees alleged that Medicare and Blue Shield records had been falsified. The periods of employment of these employees were not stated in the affidavit. The dates or frequency of the alleged falsifications or the names of the patients whose files were supposedly falsified were not recited in the affidavit.

The warrant was executed by Ms. Flannery and four FBI agents (35a, 36a). The search began at 3:30 p.m. and ended at 7:00 p.m. (56a, 66a). Every file in the office was searched (37a, 38a). Approximately 1,676 complete patient files, including "the file jackets and all material contained therein," were taken (53a, 54a, 57a). One-half to two-thirds of all files in the office were taken (33a). The files that Ms. Flannery said "she did not want" were left (38a). All files with a medical chart and any insurance paper in them were taken (13a, 34a, 61a, 66a).

On March 9, 1978, Dr. Brown filed a Rule 41 Motion (41a) in a separate civil case (WD Mich No. 78-29M) seeking the return of the seized property and suppression of the items seized. Petitioner Dorothy Brown was not a party to this proceeding (2a). The Motion was denied without hearing in a written opinion filed May 24, 1978 (2a, 5a, 8a).

On October 19, 1979, a 55-count Indictment was filed against Petitioner Dorothy Brown and her husband, Dr. William Brown (23a). The District Court had jurisdiction to try the charges under 18 U.S.C. §3231.

Counts 24 through 34 of the Indictment charged violations of 18 U.S.C §1001, the statute referenced in the search warrant. These Counts accused the Browns of knowingly submitting false Medicare claims.

The first 23 counts of the Indictment charged that the Browns violated 18 U.S.C. §287 by knowingly making false Medicaid claims.

The last 21 counts of the Indictment charged the Browns with using the mails to defraud Blue Shield of Michigan, in violation of 18 U.S.C. §1341, by knowingly submitting claims for medical services which "were in fact not received on the dates specified."

Only 29 patients of the 1,676 whose files were seized were mentioned in the indictment.

On November 8, 1979, the Browns filed a Motion in this case for return of property and suppression of evidence, on the grounds that the search warrant was unconstitutionally overbroad and exceeded the foundation of probable cause (42a).

Judge Gibson denied the suppression motion in an Opinion and Order filed February 28, 1980, which adopted by reference Judge Fox's Opinion in Case No. 78-29M (9a).

On March 21, 1980, the Browns renewed their Motions to Suppress, citing the then recently decided case of *US* v *Abrams*, 615 F2d 541 (1st Cir. 1980) (48a). Judge Gibson partially granted the Motion during trial suppressing:

> "all items seized . . . except patient medical charts, daily log sheets, (day sheets), patient ledger sheets and insurance claims forms or claims forms in connection with Medicare and/or Medicaid." (15a)

On April 22, 1980, Judge Gibson filed a written Opinion suppressing documents "of a type not specified on the face of the warrant" (11a).

Dr. Brown was acquitted on all counts. Mrs. Brown was convicted on 30 of the 35 counts that went to the jury. She was sentenced to pay a total of $3,000 in fines and to one year incarceration, which was suspended upon condition that she successfully complete two years' probation (50a).

She appealed to the U.S. Court of Appeals for the Sixth Circuit (31a) claiming that the District Court erred in failing to suppress materials seized during execution of a warrant void for overbreadth (73a). Mrs. Brown cited similar cases from other Circuits holding that warrants describing the things to be seized in terms of the statute which the evidence is alleged to violate are overbroad (73a). The Court of Appeals upheld the conviction in an unpublished Order, over the dissent of Judge Jones (1a).

REASONS FOR ALLOWANCE OF THE WRIT

I. THE SIXTH CIRCUIT'S DECISION CONFLICTS WITH THE DECISIONS OF OTHER FEDERAL COURTS OF APPEALS

A. The Sixth Circuit's Decision Directly Conflicts with the First Circuit's Decision in the Nearly Identical Case of *US* v *Abrams*.

US v *Abrams*, 615 F2d 541 (1st Cir. 1980) presented facts nearly identical to the ones presented in this case. Without distinguishing *Abrams*, the Sixth Circuit reached a directly contrary result. A clear conflict between the Circuits exists.

Abrams involved an HEW investigation of Medicare fraud. So did this case. The *Abrams* investigation began, like the Brown investigation, when former employee-informants told the government that Medicare bills had been submitted for work not done.

The *Abrams* warrant authorized seizure of:

> "[C]ertain business and billing and medical records of patients Doctors Abrams, London, Braun, and Abrams, London and Associates, Inc. which show actual medical services performed and fraudulent services claimed to have been performed in a scheme to defraud the United States and to submit false medicare and medicaid claims for payments to the United States or its agents; in violation of Title 18, United States Code, Section 1001[.]" *US* v *Abrams*, 615 F2d at 542. (79a-80a)

The Brown warrant authorized seizure of:

> "records, books and accounts pertaining to the following:
>
> Patient Medical Charts
> Daily Log sheets—'Day Sheets'
> Patient ledger sheets
> Insurance claim forms
>
> which are in violation of Title 18, United States Code, Section 1001[.]" (20a)

In each case all Medicare and Medicaid records and some additional records were seized. Each search lasted about three and one-half hours.

The *Abrams* Court found the warrant overbroad saying:

> "The warrant at issue fails to meet the requirement of particularity. The officers' discretion was unfettered, there is no limitation as to time and there is no description as to what specific records are to be seized. As a result of this general description, the executing officers seized all of the Medicare and Medicaid records of the three doctors and, in addition, records of non-Medicare-Medicaid patients. It seems clear that the executing officers could not or made no attempt to distinguish bona fide records

> from fraudulent ones so they seized all of them in order that a detailed examination could be made later. This is exactly the kind of investigatory dragnet that the fourth amendment was designed to prevent." 615 F2d at 543.

What was said about the *Abrams* warrant applies with equal force to the warrant in this case. There was no time limit on the records to be seized from the office. Records 25 years old were seized, even though they antedated both the period of limitations and the Medicare and Medicaid Acts (42a-43a, 46a-47a, 68a).

The files taken filled up the trunk and backseat of Ms. Flannery's car (38a) and constituted one-half to two-thirds of all the files in the office (53a, 63a). The government made a detailed examination of the 1,676 seized files in the year and a half before 29 of them were selected for inclusion in an Indictment (64a, 65a, 69a, 70a, 71a).

The officers executing the Brown warrant made no effort "to distinguish bona fide records from fraudulent ones", seizing all Ms. Flannery "wanted" instead so that they could be perused at leisure later (38a, 66a-67a).

The *Abrams* warrant was less specific than the warrant in this case. Both warrants called for the seizure of records "in violation of" 18 U.S.C. §1001 (20a, 80a). However, the *Abrams* warrant indicated that the nature of the fraud that would be shown by the records had to do with Medicare and Medicaid. The *Abrams* warrant said the records would show both actual services performed and fraudulent services claimed. It was at least implied that the agents executing the warrant could find what they were looking for by comparing sets of records.

The *Brown* warrant, by contrast, did not specifiy the nature of the fraud to be shown by the records to be seized. The warrant did not suggest that the documents would show a discrepency between what was done and what was billed.

There is a striking similarity between the *Abrams* warrant's description of the categories of records to be seized and the description in the *Brown* warrant.

The *Abrams* warrant directed the seizure of "business and billing and medical records of patients." The *Brown* warrant called for the seizure of "records, books and accounts pertaining to" the financial and medical records of patients.

The *Brown* warrant directed seizure of "records, books and accounts pertaining to . . . patient medical charts . . ." The *Abrams* warrant called for seizure of "medical records of patients."

The similarity between *Abrams* and this case extends to the affidavits for search warrants, which are reprinted in the appendix[1] (17a, 74a). Both affidavits recited allegations of a few former employees and patients that claims had been submitted for work not done. The *Abrams* affidavit said there were at least 50 incidents of overbilling (77a). The *Brown* affidavit mentioned only nine specific instances of alleged overbilling. The dates of employment of the former employees were not given in either affidavit. No claim was made in either affidavit that every Medicare and Medicaid file contained fraudulent information.

The search warrant in this case could have described with particularity the documents to be seized (i.e. the records of the patient-information or records which showed billings to Medicaid for services not shown on patient charts). It could have given a timeframe (i.e. the periods of employment of the informant-clerks). It could have described the natu of the fraud being investigated. It could

[1] This Court can take judicial notice, under FRE 201, of the records in the *Abrams* case. *US* v *Jones*, 580 F2d 219, 223 (6th Cir. 1978) The contents of the affidavit, warrant and return in *Abrams* are beyond dispute. The accuracy of the appendix can be easily ascertained by comparing it with the official, public record of the Massachusetts District Court. The *Abrams* affidavit was also quoted in the margin of the decision. 615 F2d at 543 n. 6.

have said how billing records could be compared with patient charts to determine which records were "in violation of" 18 U.S.C. §1001. The Sixth Circuit's failure to require the specificity which could easily have been incorporated in the warrant conflicts directly with the decision in *US* v *Abrams*, 615 F2d 541, 545 (1st Cir. 1980).

Abrams cannot be distinguished on its facts. It is nearly identical to this case except for the result. This clear conflict between the Circuits should be resolved.

B. The Sixth Circuit's Decision Conflicts with Other Well-Reasoned Decisions of the First Circuit.

The Sixth Circuit's decision in this case conflicts with *Application of Lafayette Academy, Inc*, 610 F2d 1 (1st Cir. 1979), a case where the warrant authorized seizure of a laundry list of items in violation of "18 U.S.C. Sections 286, 287, 371, 1001 and 1014." The warrant's particularization of items to be seized in *Lafayette Academy* was infinitely more detailed than the particularization of the things to be seized under the *Brown* warrant. However, the First Circuit found the warrant to be a general warrant saying:

> "[A] principal deficiency here is the lack of particularity in the phrase which purports to qualify and delineate the generic categories of items: the description 'books, papers . . . letters, correspondence, documents, . . . which are and constitute evidence of the commission of violations of the [federal conspiracy and fraud statutes]' provides insufficient guidance to the executing officer as to what items from among many he should seize. The qualifying phrase in effect does nothing to limit the broad warrant description." *Lafayette Academy*, supra, 610 F2d at 5.

In Petitioner Brown's case, as in *Lafayette Academy* and *Abrams*, the items to be seized were ultimately described by reference to sections of the U.S. Code allegedly violated.

Lafayette Academy, supra, 610 F2d at 4, n4, suggested simple measures to limit the generality of warrants authorizing seizure of great quantities of documents, such as specifying "time periods and the like."

US v *Roche*, 614 F2d 6 (1st Cir. 1980) involved search warrants issued to seize information concerning an extensive fraud scheme involving overcharges for automobile insurance. The warrants authorized seizure of:

> "books, records, documents, consisting of but not limited to insurance applications, premium notices, claims requests for recovery, correspondence relating to applications and claims, policies, ledger sheets, invoices, account journal, and office week ending progress reports which are evidence, fruits and instrumentalities of the violation of Title 18, United States Code, Section 1341." *US* v *Roche*, 614 F2d at 7.

The *Roche* Court said:

> Here, the government could have limited the objects of search and seizure to documents and records pertaining to automobile insurance, but declined to do so. This impermissibly broadened the scope of the search beyond the foundation of probable cause." *US* v *Roche*, 614 F2d at 7.

As in *Lafayette Academy*, supra, the Court expressed concern that the warrants were not limited to records generated in a stated period of time. *US* v *Roche*, 614 F2d at 7, n 1.

The *Brown* warrant was not limited to the specified instances of Medicare fraud recited in the affidavit. The unspecified instances of fraud directed against Blue Shield must have occurred, if at all, within the time of the informants' employment. However, the warrant was not limited to a search for records in that time frame. Having received limited information concerning wrongdoing, the government

chose to conduct a general, exploratory search to see if it could discover more. It did not let the Constitution stand in its way.

The First Circuit has struck down other warrants that describe records to be seized by reference to the statute they violate. See *US* v *Klein*, 565 F2d 183 (1st Cir. 1977), which was characterized this way in *US* v *Cortellesso*, 601 F2d 28, 31 (1st Cir. 1979), cert den 444 US 1072 (1980):

> "In *Klein* we required first, that the evidence presented to the magistrate must establish that there is reason to believe that a large collection of similar contraband is present on the premises to be searched, and second, that the evidence before the magistrate must explain the method by which the executing agents are to differentiate the contraband from the rest of defendant's inventory."

Even if it is assumed that Ms. Flannery's affidavit established reason to believe that there was a large quantity of records indicating a violation of 18 U.S.C. §1001 at Dr. Brown's office, there was no evidence before the Magistrate to explain "the method by which the executing agents are to differentiate" the records "in violation of" 18 U.S.C. §1001 from all others.

Montilla Records of Puerto Rico, Inc v *Morales*, 575 F2d 324 (1st Cir. 1978), dealt with the propriety of a search warrant which called for the seizure of sound recordings:

> "which have been manufactured from sound recordings protected by the Copyright Act without the permission of the sound recordings copyright owner, and all records relating to the manufacture, distribution and sale of unauthorized copies of copyrighted sound recordings . . ." 575 F2d at 325

The Court found the warrant in that case to be overbroad. The affidavit upon which it was based indicated that the premises to be searched were likely to have on them

illegally manufactured Motown sound recordings. The Court noted:

> "However, there is nothing in the search warrant that would indicate to the executing officer that his authority was limited to the seizure of only Motown records. It is obvious from the conduct of the agents who participated in the search that they did not consider their authority to be limited since they examined and seized recordings other than Motown.
>
> "The purpose of the particularity requirement in search warrants is to 'make general searches under them impossible and prevent[s] the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant.' " 575 F2d at 326 (citation omitted)

The Court went on to say:

> "The warrant here could have easily been circumscribed to permit only the seizure of recordings bearing a Motown label." 575 F2d at 326

The Court held that the failure to specifically limit the seach warrant to the areas covered by the affidavit was a fatal defect and held the warrant invalid.

The warrant in this case would have been held unconstitutionally overbroad in the First Circuit. The Supreme Court should resolve this conflict.

C. The Sixth Circuit's Decision in this Case Also Conflicts with the Decisions of Other Circuits.

US v *Marti*, 421 F2d 1263, 1267, 1268 (2d Cir. 1970), struck down as overbroad a warrant which directed the seizure of "any property 'being used and/or possessed in

violation of " New York's obscenity statute. The Court said that:

> "This general direction on its face left to the executing officers the task of deciding which property was obscene in violation of the state obscenity law and thus subject to seizure.
>
> * * *
>
> "The warrants themselves gave no guidelines to the officers as to what is obscene and what is not."

The Court held the warrants:

> "deficient for failing to describe with particularity the items to be seized as required by the Fourth Amendment. The danger underlying such general warrants is that the person searched is at the mercy of the executing official." 421 F2d at 1268. (citations omitted)

In this case, the officers executing the warrants were given no guidance on how to determine what records were in violation of 18 U.S.C. §1001 and which ones were not. The Defendants Brown were "at the mercy of the executing official." If Ms. Flannery said she did not want a file, it stayed (58a). Otherwise, it was seized with all it contained. The warrant did not inform the Browns, as it was required to do, of what the officers were entitled to take. *Application of Lafayette Academy, Inc*, 610 F2d 1, 5 (1st Cir. 1979). By directing the seizure, in effect, of all documents related in any way to insurance, the warrant went beyond the limits of probable cause. *Lafayette Academy*, supra, 610 F2d at 5-6.

The decision in this case conflicts with *VonderAhe* v *Howland*, 508 F2d 364 (9th Cir. 1975). In *VonderAhe*, a dentist's former employee told the Internal Revenue Service that the dentist had not disclosed records of income for emergency work done in 1966 and 1967. An exact

description of the information allegedly withheld was given to the IRS agents. The Court said that:

> "In spite of the fact that the 'things' to be seized and the places to be searched were known to the Service with a high degree of specificity, the warrants as they were requested and issued were, for all practical purposes, 'general warrants.' " 508 F2d at 366.

The warrant authorized the seizure of the dentist's "fiscal records relating to . . . income and expenses . . ." including a large number of specified categories of items. 508 F2d at 366-367. The warrants took many hours and many agents to execute and resulted in the agents proceeding "to asport practically every piece of paper they could lay their hands on." 508 F2d at 365. The Court held that:

> "To proceed by the 'warrant' method without first seeking the desired papers by request or subpoena should be based upon the strongest showing of necessity but if such drastic procedure is to be availed of, it should be strictly limited as constitutionally required." 508 F2d at 369.

The Court also said that:

> "Upon the information available to it, the government knew exactly what it needed and wanted and where the records were located." 508 F2d at 370.

It held the warrants unconstitutionally overbroad.

US v *Drebin*, 557 F2d 1316, 1322-1323 (9th Cir. 1977), cert den 437 US 904 (1978), dealt with a warrant which directed the seizure of pirated films and:

> "books, records, papers and other documents relating to the manufacture and sale of such motion pictures and equipment used in the sale and

> distribution of such motion pictures which are the fruits and instrumentalities of violations of Title [18], United States Code, 371 and 2314."

The Court held that:

> "Similar to [*US* v *Marti*, 421 F2d 1263 (2d Cir. 1970)], this warrant left to the executing officers the task of determining what items fell within the broad categories stated in the warrant. The warrant provided no guidelines for the determination of which films had been illegally reproduced."

The Court held the warrant invalid.

The Eighth Circuit has required "some degree of particularity" as to the dates of records or documents to be seized pursuant to a search warrant where the affidavit for search warrant does not provide probable cause to believe that all records of a particular type are likely to be incriminating. In *Pieper* v *US*, 604 F2d 1131 (8th Cir. 1979), the Court suppressed 19 months worth of records which were seized under a warrant issued upon an affidavit showing only one violation.

At least three Circuits (the First, Second and Ninth) have decided cases invalidating warrants which described documents to be seized ultimately in the terms of the statute which they were alleged to have violated. A number of state courts have reached similar results. See *New York* v *Martin*, 267 NYS2d 404, 408-409 (S Ct 1966); *South Dakota* v *Nelson*, 169 NW2d 533, 535 (1969); *Connecticut* v *Johnson*, 273 A2d 702, 705 (1970). The decision of the Sixth Circuit in this case did not distinguish (or even mention) these authorities. A conflict exists between the Circuits on a significant question of constitutional law. This Court should grant certiorari to resolve the conflict.

II. THE DECISION OF THE COURT OF APPEALS SANCTIONS A SUBSTANTIAL DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDING AND HAS DECIDED A FEDERAL QUESTION IN A WAY WHICH CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT

> "The Fourth Amendment provides that 'no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and *particularly describing* the place to be searched, and the persons or *things to be seized.*'
>
> "These words are precise and clear. They reflect the determination of those who wrote the Bill of Rights that the people of this new Nation should forever 'be secure in their persons, houses, papers, and effects' from intrusion and seizure by officers acting under the unbridled authority of a general warrant." *Stanford* v *Texas*, 379 US 476, 481 (1965). (Emphasis in original)
>
> "General searches have long been deemed to violate fundamental rights. It is plain that the [fourth] amendment forbids them." *Marron* v *US*, 275 US 192, 195 (1927).
>
> "It is contrary to the first principles of justice to allow a search through all the respondents' records, relevant or irrelevant, in the hope that something will turn up." *FTC* v *American Tobacco Company*, 264 US 298, 306 (1924).

The search warrant issued in this case resulted in a general search. The officers executing the warrant rummaged at large through confidential medical records before carting off a carload full of them to review for months (58a, 59a, 67a, 68a, 69a). A great deal of irrelevant material was taken, since only 29 of the 1,676 files seized were used in the prosecution of Mrs. Brown. The Sixth

Circuit sanctioned this general search despite the decisions of this Court strictly construing the Fourth Amendment.

The warrant issued in this case was defective under *Andresen* v *Maryland*, 427 US 463, 480 (1976), which held:

> "General warrants of course, are prohibited by the Fourth Amendment. '[T]he problem [posed by the general warrant] is not that of intrustion *per se*, but of a general, exploratory rummaging in a person's belongings. . . . [The Fourth Amendment addresses the problem] by requiring a 'particular description' of the things to be seized.' *Coolidge* v *New Hampshire*, 403 U.S. 443, 467 (1971). This requirement "makes general searches . . . impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant." *Stanford* v *Texas*, 379 U.S. 476, 485 (1965), quoting *Marron* v *United States*, 275 U.S. at 196."

By directing the seizure of documents "in violation of Title 18, U.S.C. §1001" the Magistrate left it up to the executing officers to determine which documents violated the law and should be seized. Since the officers "had no guidance at all, they seized" all the records connected with insurance. Compare *US* v *Abrams*, 615 F2d 541, 544 (1st Cir. 1980).

The decision of the Sixth Circuit departed from the usual and accepted course of judicial proceedings as set forth by the decision of this Court in *Marcus* v *Search Warrants*, 367 US 717 (1961). Although *Marcus* is not directly controlling because it involved a due process claim under the Fourteenth Amendment rather than a claim under the Fourth Amendment, the warrants and procedure followed in *Marcus* to seize allegedly obscene material were deficient in the same way as the warrant and procedure followed in this case.

The Court described the warrants in *Marcus* this way:

> "The warrants gave the broadest discretion to the executing officers; they merely repeated the language of the statute and the complaints, specified no publications, and left to the individual judgment of each of the many police officers involved the selection of such magazines as in his view constituted 'obscene * * * publications.'
>
> * * *
>
> "It is plain that in many instances, if not in all, each officer actually made *ad hoc* decisions on the spot and, gauged by the number of publications seized and the time spent executing the warrants each decision was made with little opportunity for reflection and deliberation." 367 US at 732

In Petitioner Brown's case, there was little opportunity for reflection or deliberation by the officers executing the warrants. They were directed to seize documents and records "in violation of" 18 U.S.C. §1001. The warrant did not even repeat "the language of the statute." The decision on what to take was left to the discretion of the executing officers. Agent Harrell described the *ad hoc* process by which it was decided which files would be seized, saying:

> "We did not take all of his files. Miss Flannery would stipulate that there were certain files that she did not want as we were going through and we left those files." (58a)

Ms. Flannery testified that no effort was made to look for "Day Sheets" mentioned in the warrant (66a). If a file had a medical chart and any sort of insurance form in it, then it was taken to be perused at the government's leisure (13a, 54a, 58a, 61a, 66a-67a, 68a).

Ms. Flannery did not provide enough information to the Magistrate to establish probable cause to believe that every file with an insurance paper in it contained evidence of a

violation of 18 U.S.C. §1001. A search through all the files and the seizure of nearly 1,700 of them so they could be intensively reviewed for a year and a half was the sort of "exploratory rummaging" expressly prohibited by the decisions of this Court. Certiorari should be granted to review the decision of the Sixth Circuit.

CONCLUSION

A Writ of Certiorari should issue to review the Judgment and Opinion of the United States Court of Appeals for the Sixth Circuit. Alternatively, a Writ of Certiorari should issue for the purpose of remanding to the Sixth Circuit for reconsideration and entry of an opinion providing a rationale for the decision reached.

Respectfully submitted,

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Office-Supreme Court, U.S.
FILED
JUL 1 1981
L. STEVAS,
CLERK

No. 81-8

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1980

DOROTHY BROWN
Petitioner

-vs-

UNITED STATES OF AMERICA
Respondent

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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No. 80-5209
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA
Plaintiff-Appellee

v.

DOROTHY BROWN
Defendant-Appellant

ORDER
(Filed: May 5, 1981)

Before WEICK, KEITH and JONES, Circuit Judges.

Upon consideration of the briefs, record and arguments of counsel in this appeal by appellant Brown from her judgment of conviction by a jury in the district court on eighteen (18) counts of an indictment charging knowingly presenting false Medicaid claims in violation of 18 U. S. C. § 287, six (6) counts of making false Medicare statements in violation of 18 U. S. C. § 1001 and six (6) counts of using the mails to defraud Blue Shield of Michigan in violation of 18 U. S. C. § 1341, we are of the opinion that the search warrant was sufficiently specific in its description of the things to be seized and no prejudicial error occurred in the execution of the warrant. The district court did not err in denying the motion to suppress.

It is therefore ordered that the judgment of conviction be affirmed. Judge Jones dissents.

ENTERED BY ORDER OF THE COURT
(s) JOHN P. HEHMAN
Clerk

Opinion

UNITED STATES OF AMERICA
IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,
v.
OFFICE OF WILLIAM J. BROWN, DPM.

OPINION
(Filed: May 24, 1978)

This action was brought pursuant to Rule 41 of the Federal Rules of Criminal Procedure for the return of seized property and the suppression of evidence.[1] Before the merits of the motion[2] can be reached, it is necessary to determine whether this court has jurisdiction over the matter.

The facts are easily summarized. (In 1975 the Office of Program Integrity, Department of Health, Education and

---

[1] This case has been captioned in the pleadings filed thus far as "United States of America v. Office of William J. Brown, DPM." The proper reference to the matter is "William J. Brown v. Joseph A. Califano, Secretary of United States Department of Health, Education and Welfare, Deirdre M. Flannery, Program Integrity Officer, Department of Health, Education and Welfare, and James S. Brady, United States Attorney for the Western District of Michigan," since the search and seizure were sought by the United States Attorney, and the items seized are presently in the custody of HEW officials under the direction of the Secretary and the Program Integrity officer in charge of this investigation. Inasmuch as no criminal charges have been brought, this matter is civil in nature, even though jurisdiction is asserted under the Federal Rules of Criminal Procedure. See text, *infra*. Dr. Brown will hereinafter be referred to as "plaintiff."

[2] The initial pleading in this matter was entitled a "motion." As noted by Judge Wyzanski in *Lord* v. *Kelley*, 223 F.Supp. 684, 688 (D. Mass. 1963), appeal dismissed, 334 F.2d 742 (1st Cir. 1964), cert. denied, 379 U.S. 961, 85 S.Ct. 650, 13 L.Ed.2d 556 (1965), "the word 'complaint' or 'petition' is a more correct description of the opening gambit."

Welfare, began an investigation of Dr. Brown's Medicare claims.) On February 23, 1978, the Magistrate for the Western District of Michigan issued a search warrant based upon an affidavit filed by Deirdre M. Flannery, a Program Integrity officer apparently assigned to this case.[3] The warrant authorized the search of Dr. Brown's office for patient medical charts, daily log sheets, patient ledger sheets and insurance claim forms. These records were allegedly evidence of violations of 18 USC §1001.[4] Later that day the search was made by an agent of the Federal Bureau of Investigation, and the items were seized. On March 9, 1978, Dr. Brown filed the motion for the return of seized property and suppression of evidence. No indictment has yet been brought.

It is well established that "federal district courts have power to order the suppression or return of unlawfully seized property even though no indictment has been returned and thus no criminal prosecution is yet in existence." *Hunsucker* v *Phinney*, 497 F.2d 29, 32 (5th Cir. 1974), cert. denied, 420 U.S. 927, 95 S.Ct. 1124, 43 L.Ed.2d 397 (1975). The jurisdiction has been termed "Anomalous." *Lord* v. *Kelley*, 223 F. Supp. 684, 688 (D. Mass. 1963), appeal dismissed, 334 F.2d 742 (1st Cir. 1964), cert. denied, 379 U.S. 961, 85 S.Ct. 650, 13 L.Ed.2d 556 (1965), and is said to be governed by equitable principles so that the exercise of jurisdiction is subject to the discretion of the court. *Richey* v. *Smith*, 515 F.2d 1239, 1243 (5th Cir. 1975), on remand, 436 F.Supp. 572 (E.D. Tex. 1977).

---

[3] The affidavit and warrant are attached hereto as Appendix A.

[4] 18 USC §1001 provides as follows:

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and wilfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Among the factors to be considered are, (1) whether the government agents blatently disregarded the constitutional rights of the subject of the search; (2) whether the plaintiff has an individual interest in and a need for the material whose return he seeks; (3) whether the plaintiff would be irreparably injured by denial of the return of the property; (4) whether the plaintiff has an adequate remedy at law for the redress of his grievance. See *Hunsucker, supra,* at 34-35; *Richey, supra,* at 1243-44.

I find that on the facts of this case jurisdiction should be exercised. While there clearly has been no blatent disregard for constitutional rights here, it is equally evident that plaintiff has a great interest in, and an obvious need for, the material seized from his office. Dr. Brown has an active medical practice, and he cannot continue that practice in the manner to which his patients are accustomed without his files. If the materials were seized illegally plaintiff would suffer irreparable harm by denial of their return insofar as he might lose patients or could not treat them as efficiently as might be necessary. Additionally, if the copies made of the records lead to an indictment, the stigma that can redound to one indicted would cause irreparable damage to plaintiff. *See Richey* v. *Smith,* 436 F.Supp. 572, 574 (E.D. Tex. 1977).

Turning now to the merits, I note initially that since there is no dispute as to the material facts, no hearing is required. *See United States* v. *Carlino,* 400 F.2d 56, 58 (2d Cir. 1968); *United States* v. *Tribote,* 297 F.2d 598, 600 (2d Cir. 1961). This case is identical in this respect to *United States* v. *Gardner,* 308 F.Supp. 425 (S.D. N.Y. 1969). Defendant there sought to suppress, pursuant to Rule 41, F.R.Crim. P., a quantity of narcotics allegedly found in his apartment. The search there, like here, was conducted pursuant to a warrant issued on the basis of an affidavit by an official of a federal agency. There, like here, the sufficiency of the affidavit to establish the requisite

probable cause was questioned. The result reached there is equally applicable here: "[t]his is an issue of law which may be determined from the face of the affidavit."[5] *Id.* at 426-27.

Plaintiff alleges that "the probable cause for the issuance of the search warrant is clearly lacking and furthermore this is nothing more but a classic example of a generally exploratory search which is repugnant to constitutional ideals." (Plaintiff's Memorandum in Supports of Motion to Return Property, at 4.) It is axiomatic, of course, that a search warrant must not only be based upon a showing of probable cause, but must also particularly describe the place to be searched, and the persons or things to be seized. *U.S. Const.*, amend. IV. This is the standard against which the warrant here must be judged.

The warrant was based upon an affidavit filed by Deirdre M. Flannery, Program Integrity officer, Department of Health, Education and Welfare. She states therein that an HEW investigation of Dr. Brown's Medicare claims was initiated after the Program Integrity Office received a complaint from one of Dr. Brown's patients that the doctor had submitted claims to Medicare for services she had never received. She further states that two former billing clerks for Dr. Brown described means by which they falsified insurance forms under instructions from Dr. Brown and his wife. Finally, she states that interviews with two additional patients of Dr. Brown revealed further occasions

[5] Unlike Dr. Brown, the defendant in *Gardner* also claimed that a hearing was required to determine whether the facts alleged in the affidavit were true. As to this argument the court responded that "unsupported speculation with no specific allegation calling any of the information recited in the affidavit into question and with no affidavit from the defendant himself is wholly insufficient to justify such a hearing. . . . Evidentiary hearings are required only when the petition alleges facts which if proved would require the granting of relief." *Id.* at 427 n. 1 and cases cited therein. *See United States* v. *Simpson*, 400 F.Supp. 1396, 1398 (S.D.N.Y. 1975).

of Medicare claims filed for unperformed services. The warrant itself authorizes the search and seizure of "records, books and accounts pertaining to the following: patient medical charts, daily log sheets—'day sheets,' patient ledger sheets, insurance claim forms."

As noted above, see note 5, *supra*, plaintiff does not challenge the facts alleged in the affidavit. Rather, he asserts that the affidavit does not "bear some sort of common sense resemblance to the requested information." (Plaintiff's Memorandum in Support of Motion to Return Property, at 3.) This contention borders on the frivolous. The affidavit deals with alleged Medicare fraud by falsification of records in violation of 18 USC §1001. There could be no closer "resemblance to the requested information" than the affidavit here bears to the records sought in the search warrant. The affidavit identifies each person who supplied information. There is no reason to question their reliability. Sufficient underlying facts, rather than mere conclusions by the affiant, were presented to permit the magistrate to conclude that an offense has been or was being committed. It is obvious that in making a determination of probable cause the magistrate was not required to limit the warrant to the records of the patients mentioned in the affidavit insofar as there was direct support for the conclusion that a pattern of falsifying records existed. In addition to the patients' statements, two former billing clerks stated that claims were falsified on a regular basis. This is more than adequate to satisfy the requisite showing of probability of criminal conduct.

With respect to plaintiff's contention that the warrant here did not describe the items sought with sufficient particularity so as to amount to a fishing expedition, the response is as facile as it was above. The affidavit established probable cause that plaintiff was falsifying Medicare claims. The search warrant explicitly identified the items sought, and was limited to those records relevant

to the Medicare issue. This is not a case in which the warrant permitted a search of all the records "in the hope that something tending to incriminate the [plaintiff] may turn up." *FTC* v. *American Tobacco Co.*, 264 U.S. 298, 306, 44 S.Ct. 336, 68 L.Ed. 696 (1924). *See Andresen* v. *Maryland*, 427 U.S. 463, 478-81, 96 S.Ct. 2737, 49 L.Ed.2d 627 (1976).

It being the conclusion of the court that the search of plaintiff's records was not unlawful, the motion to return property and suppress evidence will be denied.

Dated: May 24, 1978.

(s) NOEL P. FOX
Chief Judge
United States District Court
Western District of Michigan

CERTIFIED AS A TRUE COPY
Gerald H. Liefer, Clerk
By: (s) M. HANITAK
Deputy Clerk

UNITED STATES OF AMERICA
IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

v.

OFFICE OF WILLIAM J. BROWN, DPM.

ORDER
(Filed: May 24, 1978)

In accordance with the accompanying opinion, the motion filed by Dr. William J. Brown to return property and for the suppression of evidence is denied.

IT IS SO ORDERED.

Dated: May 24th, 1978.

(s) NOEL P. FOX, *Chief Judge*
Western District of Michigan

Excerpts from Consolidated Opinion

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES,
Plaintiff,

v. Case No. G79-73 CR

DOROTHY BROWN,
Defendants.

CONSOLIDATED OPINION AND ORDER
ON PENDING PRE-TRIAL MOTIONS
(Filed: February 28, 1980)

Defendants stand accused under a 55 count indictment which concerns the deliberate provision of misinformation in the course of obtaining compensation for medical services rendered. The Indictment presents three groups of charges: Counts 1-23 allege the submission of false Medicaid claims, proscribed by 18 U.S.C. §287;[1] Counts 23-34 allege the making of false statements in Medicare payment request forms, contrary to 18 U.S.C. §1001;[2] Counts 35-55 allege the use of the mails to defraud private insurance companies by means of false representations, in violation of 18 U.S.C. §1341. All counts are also stated to be in violation of 18 U.S.C. §2(a).[3] The defendants have submitted a number of pretrial motions under Fed.R.Crim.P. 12(b). They urge that counts 1-23 and 1-34 be dismissed due to flaws in the Indictment and that all charges against them be dropped because of delay in initiating this prosecution. They seek to discover the grand jury testimony of a former employee, and demand the suppression of certain evidentiary materials seized from them. The Court has had the benefit of the parties' arguments in numerous memoranda and at oral argument heard on 17 January 1980. The Court concludes that all pending defense motions should be denied. The motions are treated *seriatim* in the following discussion.

IV. MOTION TO SUPRESS EVIDENCE

Many counts of the Indictment rely upon information garnered from files seized from the defendants on 23 February 1978. The defendants move to bar the use of the files as evidence at trial. They argue that the scope of the warrant authorizing seizure was unreasonably broad. These arguments, on the identical facts, were raised by the defendants in a motion brought after the 1978 search warrant was executed, but before the defendants were indicted on the present charges. *United States* v. *Office of William J. Brown, D.P.M.*, No. 78-29M (W.D. Mich. 1978). Upon a careful examination of the facts and controlling law, Chief Judge Fox of this District found that the search of the defendants' records "was not unlawful," and consequently denied the motion to suppress evidence. Since the Court neither perceives nor is presented with any reason to reopen Judge Fox's decision, the defendants' motion to suppress is denied. The Court adopts Judge Fox's opinion of May 24, 1978 in its entirety.

IT IS SO ORDERED.

Dated: Feb. 28, 1980 (s) BENJAMIN F. GIBSON
United States District Judge

Opinion and Order

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES,
Plaintiff,

v. Case No. 79-73 Cr.

WILLIAM J. BROWN, D.P.M. and
DOROTHY BROWN,
Defendants.

OPINION AND ORDER
(Filed: April 22, 1980)

The defendants, for the third time, challenge the Fourth Amendment propriety of the search warrant by which the Government obtained much of its documentary evidence against them. Their motion is prompted by, and rests exclusively upon, a recent unpublished opinion of the First Circuit. *United States* v. *Abrams*, No. 79-1073 (1st Cir. Jan 22, 1980), *excerpted in* 26 Crim. L. Rep. (BNA) 2509 (1980) (search warrant in Medicare fraud investigation held invalid due to insufficiently particular description of physician's records to be seized). Although the Court finds reconsideration of the motion to be proper at this point in the proceedings, it perceives no justification for the sweeping suppression requested by the defendants. Nevertheless, the Court has determined that those documents outside the classes described on the face of the search warrant were not properly seized, and accordingly modifies its order of 28 February 1980 to exclude them from evidence.

As a general matter, a court should not reconsider an order previously entered by another judge of coordinate jurisdiction in the same case. *See* Annot., 20 A.L.R.Fed. 13 (1974). Nevertheless, the Court believes that such reconsideration is proper where, as here, vindication of a

procedural safeguard of constitutional magnitude could avoid the possibility of retrial should the original order be reversed upon appeal. *United States* v. *Koenig*, 290 F.2d 166, 172 (5th Cir. 1961), *aff'd sub nom. DiBella* v. *United States*, 369 U.S. 121 (1962); *Dictograph Products Co.* v. *Sonotone Corp.*, 230 F.2d 131, 134-6 (2nd Cir.) (L. Hand, J.), *cert. dismissed*, 352 U.S. 883 (1956). The Court thus turns to the merits of the motion.

Although defense counsel asserts that the reconsideration motion encompasses reevaluation of probable cause for issuance of the warrant, it is plain that *Abrams* pertains *only* to the particularity of description requirement found in the Fourth Amendment. Because the motion takes *Abrams* as its sole support, however, it is limited to the question of whether the description on the face of the warrant is constitutionally adequate.

The First Circuit's decision in *Abrams* is not, of course, authority binding on this Court. The case is interesting, however, because it, too, concerns the search and seizure of records in the course of a Medicare and Medicaid fraud investigation. But there the similarity ends. That the *Abrams* records and those of the Browns were seized in the course of investigating the same offense is, without more, inapposite. It is the circumstances of the individual case, and the language of the warrant under scrutiny, which are germane to the question of Fourth Amendment particularity. Unfortunately for the defendants, the *Abrams* warrant was not possessed of the saving particularity of the warrant now attacked. It provided, in relevant part, as follows:

> . . . certain business and billing and medical records of patients . . . which show actual medical services performed and fraudulent services claimed to have been performed in a scheme to defraud the United States and to submit false medicare and medicaid claims for payments to the United States or its

> agents; in violation of Title 18, United States Code, Section 1001.

The First Circuit found this description tantamount to an invalid general warrant:

> The officers' discretion was unfettered, there is no limitation as to time and there is no description as to what specific records are to be seized. . . . The warrant as drawn left it entirely up to the discretion of the officers to determine what records to seize. Since they had no guidance at all, they seized them all.

United States v. *Abrams*, No. 79-1073, slip op. at 5, 7 (1st Cir. Jan. 22, 1980). By contrast, the Brown warrant explicitly identifies the documents to be seized:

> . . . records, books and accounts pertaining to the following:
>
> Patient Medical Charts
> Daily log sheets—"Day Sheets"
> Patient ledger sheets
> Insurance claim forms
>
> which are in violation of Title 18, United States Code, Section 1001.

The agents executing the Brown warrant seized some 1,676 patient files, which contained all materials relating to a patient, including medical history under Dr. Brown's care ("patient chart"), billing, insurance claim forms, diagnostic test results (including X-rays), and hospital admission, treatment, and discharge papers. It is the Court's belief that the patient files were all that was seized, and that the documents specified in the warrant were found in them. The seized files all contained some indication of payment by third party insurance companies, both public and private.

The executing agents were not left to their own judgment in choosing the documents to seize. The warrant plainly names the materials, and identifies the purpose for which they were to be seized. 18 U.S.C. § 1001 pertains to false statements made to the United States, and files which bore the marks of Medicare or Medicaid payment involved statements, potentially false, to the United States through its intermediaries. This designation provided the agents with a clear and readily applicable test for identifying patient files within the scope of the warrant. They were left no discretion. There was no risk of rummaging at large through the defendants' files, and the intrusion upon the Browns' privacy therefore was reasonable, and acceptable, under the Fourth Amendment.

Certain of the seized files, however, contained no indication of Medicare or Medicaid—that is to say, Federal—involvement, and so were beyond the scope of the warrant, which specified 18 U.S.C. § 1001 as the offense under investigation. Many of the properly seized files also held documents of a type not specified on the face of the warrant. These materials were *not* properly seized. Under the constraints of a four hour search through thousands of files, however, it is not surprising that a small amount of dross was taken. The Court does not perceive the sort of massive improper seizure, or Governmental abuse, which would justify suppression of all fruits of the search. Accordingly, only those files and documents identified in this paragraph are suppressed for purposes of the Government's evidence at trial.

IT IS SO ORDERED.

Dated April 21, 1980 (s) BENJAMIN F. GIBSON
United States District Judge

Oral Opinion Suppressing Evidence

(112)

Morning Session
April 7, 1980

THE COURT: With reference, Mr. Jerkins, to your motion to suppress all evidence seized by the Government, the Court has given due consideration to the motion together with the legal memoranda filed by the respective parties. After due consideration, the Court concludes and a more detailed opinion will follow prior to the conclusion of the trial, that all items seized by the Government in connection with a certain search warrant should be suppressed except patient medical charts, daily log sheets, (day sheets), patient ledger sheets and insurance claims forms or claims forms in connection with Medicare and/or Medicaid. Any other items which were seized in connection with the search warrant are suppressed. That would include insurance claims forms in connection with private insurance companies.

The Court has concluded that the *Abrams* case is of some value in reaching its decision but is not completely on all fours and is somewhat distinguishable from the facts of this case. As I have said before, a detailed opinion will follow in the next several days giving specific reasons for the ruling that I have just made in connection with this motion.

(113)

This ruling does not preclude the defense from interposing any objections it would ordinarily have in connection with the introduction of the items which have not been suppressed. The Court does not conclude by this ruling that the items which have not been suppressed are admissible. Whether or not they are admissible will depend upon the facts and circumstances and any objections interposed by the defense.

Mrs. Cloyd, did the Government seize any records in addition to the ones specified that are not suppressed?

MRS. KEMPKER-CLOYD: Yes. There would be certain ones, any other items that are suppressed, those might include authorizations to operate and letters to insurance companies and yes, we did seize some of those in with the patient charts, patient medical charts.

THE COURT: You understand the ruling of the Court?

MRS. KEMPKER-CLOYD: Yes, your Honor, that I may not use anything but patient and medical charts, day sheets and patient ledger sheets and insurance claim forms.

THE COURT: In connection with Medicaid and Medicare.

(114)

MRS. KEMPKER-CLOYD: Yes sir, no Blue Shield and no other private, is that correct?

THE COURT: That's correct.

* * *

Affidavit for Search Warrant

UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF MICHIGAN

UNITED STATES OF AMERICA

vs.

Docket No. 78-29M

Case No.

OFFICE OF WILLIAM J. BROWN, DPM,
located on the north end of the first floor
at 8993 East D Avenue,
Richland, Michigan

AFFIDAVIT FOR SEARCH WARRANT
(Filed: February 23, 1978)

BEFORE Hon. Stephen W. Karr, 666 Federal Building, Grand Rapids, Mich.

The undersigned being duly sworn deposes and says:

That he has reason to believe that (on the premises known as) Office of William J. Brown, DPN, 8993 East D Avenue, Richland, Michigan (Kalamazoo County), being more particularly described as a two-story white antique brick building with black trim, said office being located on the north end of the first floor, in the Southern Division in the Western District of Michigan, there is now being concealed certain property, namely records, books and accounts pertaining to the following:

Patient Medical Charts
Daily log sheets—"Day Sheets"
Patient ledger sheets
Insurance claim forms

which are in violation of Title 18, United States Code, Section 1001.

And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows:
See attached page.

(s) Deirdre M. Flannery
Program Integrity Officer, Dept. of HEW

Affidavit for Search Warrant

Sworn to before me, and subscribed in my presence, February 23, 1978.

(s) Stephen W. Karr
Judge or Federal Magistrate

On August 6, 1975, Wilda K. Spierling complained to the local Social Security Office that Dr. William J. Brown had submitted claims to Medicare for services on 3/25/75, 4/11/75, 5/23/75, 4/25/75, and 7/18/75. Mrs. Spierling said she did not see Dr. Brown on any of those dates. Based on that complaint, the Office of Program Integrity, Department of Health, Education and Welfare, initiated an investigation of Dr. Brown's Medicare claims.

During the course of that investigation, on February 14, 1978, your affiant interviewed Patti Lowing, a former billing clerk of Dr. Brown. Mrs. Lowing stated that Mrs. Brown, Dr. Brown's wife, would have her type Medicare insurance forms for services which were never rendered to the patients, such as injections, minor debridements. Mrs. Brown would also tell her to type incorrect patient diagnoses on the Medicare claims form to insure Medicare payments for services.

On July 13, 1977, this affiant interviewed Mary Catherine Lambeth, also a former billing clerk for Dr. Brown. She stated that the Browns had submitted false X-ray claims for patients at the Plainwell Residential Facility, and also that Medicare claims for injections were sometimes sent in for doing other services because it was easier to collect for injections and X-rays. While Mrs. Lambeth was working at the Browns, Blue Shield of Michigan notified Dr. Brown that they were going to audit certain claims submitted by Dr. Brown for payment by Blue Shield of Michigan. Mrs. Brown rewrote all their files and took the originals to another file so that the auditor could not get at the original files.

Affidavit for Search Warrant

In July of 1977, affiant talked with Avah K. Myers who stated that Dr. Brown had billed Medicare for the removal of five toenails, whereas Dr. Brown had only partially removed two toenails, completely removed two toenails, but never touched a fifth nail.

In July of 1977, affiant spoke with William Klempf, who stated that the physician claims for injections into his feet for 6/3/75, 6/10/75, and 6/25/75 were false. He had never received those injections.

Search Warrant

UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF MICHIGAN

UNITED STATES OF AMERICA

vs.

Docket No. 78-29M
Case No.

OFFICE OF WILLIAM J. BROWN, DPM,
located on the north end of the first floor
at 8993 East D Avenue,
Richland, Michigan

SEARCH WARRANT
(Filed: February 23, 1978)

To OFFICERS OF THE DEPT. OF HEALTH, EDUCATION AND WELFARE OR ANY OTHER AUTHORIZED OFFICER

Affidavit(s) having been made before me by Deidre M. Flannery, Program Integrity Officer, Department of Health, Education and Welfare, that he has reason to believe that (on the premises known as) Office of William J. Brown, DPN, 8993 East D Avenue, Richland, Michigan (Kalamazoo Co.), being more particularly described as a two-story white antique brick building with black trim, said office being located on the north end of the first floor, in the Southern Division in the Western District of Michigan, there is now being concealed certain property, namely records, books and accounts pertaining to the following:

Patient Medical Charts
Daily log sheets—"Day Sheets"
Patient ledger sheets
Insurance claim forms

which are in violation of Title 18, United States Code, Section 1101, and as I am satisfied that there is probable

cause to believe that the property so described is being concealed on the person or premises above described and that grounds for application for issuance of the search warrant exist as stated in the supporting affidavit(s).

You are hereby commanded to search within a period of Ten days (not to exceed 10 days) the person or place named for the property specified, serving this warrant and making the search (in the daytime 6:00 a.m. to 10:00 p.m.) and if the property be found there to seize it, leaving a copy of this warrant and receipt for the property taken, and prepare a written inventory of the property seized and promptly return this warrant and bring the property before Stephen W. Karr as required by law.

Dated this 23rd day of February, 1978.

(s) STEPHEN W. KARR
Judge (Federal or State Court of Record) or Federal Magistrate

RETURN ON SEARCH WARRANT
(Filed: February 27, 1978)

I received the attached search warrant February 23, 1978, and have executed it as follows:

On February 23, 1978 at 3:30 o'clock P.M., I searched the person or premises described in the warrant and

I left a copy of the warrant with Dr. William J. Brown together with a receipt for the items seized.

The following is an inventory of property taken pursuant to the warrant: attached

This inventory was made in the presence of SA Gerard P. Alexander, FBI Deirdre M. Flannery, HEW Investigator and SA Bill Kuth, FBI

I swear that this Inventory is a true and detailed account of all the property taken by me on the warrant.

(s) Michael B. Hanell, FBI, SA

Subscribed and sworn to and returned before me this 27th day of February, 1978.

(s) Stephen W. Karr
Federal Magistrate

Pursuant to a federal search warrant issued on Feb. 23, 1978 by U.S. Magistrate Stephen Karr for the Western District of Michigan the following records of William J. Brown, DPM, located on the north end of the first floor at 8993 East D Avenue, Richland Michigan were seized by Deirdre M. Flannery, Program Integrity Specialist of Department of Health Education and Welfare, 300 S. Wacker Chicago, Illinois. The records include the file jackets and all material contained therein for the following listed patients:

[A list of approximately 1,676 names on 13 pages is omitted]

Indictment

UNITED STATES OF AMERICA
IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN,
SOUTHERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

vs. No. Cr.

WILLIAM J. BROWN, D.P.M. and
DOROTHY BROWN
Defendants

INDICTMENT
(Filed: October 19, 1979)

The Grand Jury charges:

COUNTS 1 THROUGH 23

1. At all times material to this indictment, the Michigan Department of Social Services acted as fiscal agent for the United States Department of Health, Edcuation and Welfare and disbursed funds based upon claims presented by medical practitioners and others under a state plan approved under Title XIX of the Social Security Act, as amended, which provided for grants to states for medical assistance programs.

2. At all times material to this indictment, Doctor William J. Brown was a podiatrist licensed to practice in the State of Michigan at his office located at either 1128 S. Westnedge, Kalamazoo and or 8992 D Avenue, Richland, Michigan.

3. At all times material to this Indictment, Dorothy Brown acted as office manager and billing supervisor at the office of Doctor William J. Brown.

4. On or about the dates herein below set forth, in the Western District of Michigan, Southern Division, Doctor William J. Brown and Dorothy Brown did make and present or cause to be made and presented to the Michigan Department of Social Services, claims upon or against the United States of America to secure payment under Title XIX of the Social Security Act, for medical services, whereas in truth and in fact, the herein named defendants William J. Brown and Dorothy Brown knew the claims to be false in that such patients did not receive the treatments on the dates specified on the claims.

Count	Patient Name	Date of Statement	Date of Treatment	Treatment
1	Eyrcel Linderman	04-14-75	04-14-75	Injection small joint toes, left foot
2	John Lopez	06-30-75	06-03-75	Injection small joint toes, right foot
3	John Lopez	05-19-75	05-19-75	Reduction of corns and calluses of skin of foot bilateral
4	Jason Meulman	08-01-77	07-25-77	Chemocautery destruction with surgical curettement of local lesions, left foot (hereafter known as chemocautery)
5	Jason Meulman	08-04-77	08-01-77	Chemocautery, left foot
6	Todd Meulman	06-14-77	05-03-77	Chemocautery, right foot
	" "	"	05-09-77	" " "
	" "	"	05-16-77	" " "
7	Petra Nelson	04-01-75	01-03-75	Chemocautery
	" "	"	01-10-75	"
	" "	"	01-17-75	"
8	Petra Nelson	02-24-75	12-06-74	Chemocautery
9	Petra Nelson	10-25-74	10-25-74	Chemocautery
10	Hanna Simmons	06-02-75	04-15-75	Surgical excision of nail edge
11	Hanna Simmons	11-14-75	06-26-75	Injection small joint toes, right foot
12	Irene Virag	02-21-75	02-21-75	Injection small joint toes, left foot
13	Glennedean Vosberg	11-14-75	09-09-75	Chemocautery, right foot
	" "	"	09-16-75	" " "
	" "	"	09-23-75	" " "
14	Glennadean Vosberg	12-09-75	08-27-75	Emergency first aid for Sprained Ankle

Count	Patient Name	Date of Statement	Date of Treatment	Treatment
15	Glennadean Vosberg	08-05-75	08-04-75	Chemocautery, right foot
16	Albert Yarber	07-14-75	11-06-74	Chemocautery, right foot
	" "	"	11-12-74	" " "
	" "	"	11-19-74	" " "
	" "	"	11-26-74	" " "
17	Albert Yarber	07-14-75	10-01-74	Chemocautery, right foot
	" "	"	10-07-74	" " "
	" "	"	10-22-74	" " "
	" "	"	10-27-74	" " "
18	Albert Yarber	04-01-75	09-02-74	Chemocautery
	" "	"	09-09-74	"
	" "	"	09-16-74	"
	" "	"	09-22-74	"
19	Albert Yarber	03-10-75	08-05-75	Chemocautery
	" "	"	05-12-74	"
	" "	"	05-19-74	"
	" "	"	05-27-74	"
20	Albert Yarber	03-03-75	07-09-74	Chemocautery
	" "	"	07-16-74	"
	" "	"	07-23-74	"
	" "	"	07-31-74	"
21	Albert Yarber	02-24-75	06-04-74	Chemocautery
	" "	"	06-11-74	"
	" "	"	06-19-74	"
	" "	"	06-25-74	"
22	Albert Yarber	02-18-75	05-07-74	Chemocautery
	" "	"	05-14-74	"
	" "	"	05-22-74	"
	" "	"	05-28-74	"
23	Albert Yarber	12-04-74	03-05-74	Chemocautery
	" "	"	03-12-74	"
	" "	"	03-20-74	"
	" "	"	03-26-74	"

All in violation of 18 U.S.C. Sections 287 and 2(a)

COUNTS 24 THROUGH 34

1. At all times material to this indictment, Doctor William J. Brown, was a doctor licensed to practice in the State of Michigan, at his primary office located at either 1128 S. Westnedge, Kalamazoo and or 8992 D Avenue, Richland, Michigan.

2. At all times, material to this Indictment, Blue Cross and Blue Shield of Michigan was under contract with the Department of Health, Education, and Welfare to act as its agent and fiscal intermediary in receiving, adjudicating and

making payments pursuant to claims submitted under the provisions of Title XVIII of the Social Security Act.

3. At all times material to this indictment, Dorothy Brown acted as office manager and billing supervisor at the office of Doctor William J. Brown.

4. On or about the dates herein below set forth in the Western District of Michigan, Southern Division, in a matter within the jurisdiction of the Department of Health, Education, and Welfare, an agency of the United States of America, defendants Doctor William J. Brown and Dorothy Brown, did knowingly and wilfully make and cause to be made false statements and representations of material facts in that the defendants, Doctor William J. Brown and Dorothy Brown did submit and cause to be submitted to Blue Cross and Blue Shield of Michigan, documents entitled "Request for Medicare Payment—SSA-1490" to secure payment under Part B of Title XVIII of the Social Security Act, for medical services, whereas in truth and in fact, defendants William J. Brown and Dorothy Brown then and there well knew that the statements were false in that the herein named patients did not receive treatments on the date specified on the statements.

Count	Patient Name	Date of Statement	Date of Treatment	Treatment
24	Marjorie Dunham	10-13-75	10-06-75	Permanent resection of entire nails, both nail edges, bed matrix with plastic reconstruction & partial ostectomy of the distal phalanx left foot
25	Charles Fisk	03-02-75	02-21-75	Incision and removal of foreign body left foot hallux
26	Charles Fisk	06-30-75	03-26-75	Surgical excision of nail edge left foot hallux
	" "	"	04-21-75	Surgical excision of nail edge left foot hallux
27	Finis Jordan	11-01-77	03-03-77	Injection in plantar right foot
	" "	"	03-03-77	Radical resection for tumor of right foot

Count	Patient Name	Date of Statement	Date of Treatment	Treatment
28	Finis Jordan	03-21-77	03-18-77	Radical resection for tumor of left foot
29	William A. Klempp	07-01-75	05-20-75	Injection small joint toes, right foot
	" " "	"	06-10-75	" " " "
	" " "	"	06-25-75	" " " "
	" " "	"	06-03-75	" " " "
30	Avah Myers	12-29-76	12-29-76	Excision of nail and nail matrix for permanent removal single complete L 3rd digit
31	Alexander Reitz	09-17-75	08-26-75	Diagnostic X-Rays right & left foot
32	Wilda Spierling	05-05-75	01-10-75	Tenotomy on 5th digit, left foot
	" "	"	02-14-75	Capsulotomy, 4th joint, left foot
	" "	"	03-04-75	Tenotomy on 4th digit, left foot
33	Wilda Spierling	07-02-75	03-31-75	Injection small joint toes, left foot
	" "	"	04-18-75	" " " "
	" "	"	05-05-75	" " " "
34	Hanna Simmons	09-23-75	06-26-75	Injection small joint toes, right foot

All in violation of 18 U.S.C. Section 1001 and 2(a).

COUNT 35

1. Beginning from on or about the 10th day of October, 1974, and continuing thereafter to on or about the 2nd day of November, 1977, in the Western District of Michigan, Southern Division, William J. Brown, D.P.M. and Dorothy Brown, the defendants herein, devised and intended to devise a scheme and artifice to defraud and to obtain money and property from Blue Shield of Michigan by means of false and fraudulent pretenses, representations and promises, and did obtain and attempt to obtain from Blue Shield of Michigan payment for medical services which medical services were in fact not received on the dates specified.

2. At all times material to this indictment, Doctor William J. Brown, was a podiatrist licensed to practice in

the State of Michigan, at his office located at either 1128 S. Westnedge or 8892 D Avenue, Richland, Michigan; and at all times material to this indictment, Dorothy Brown acted as office manager and billing supervisor at the office of William J. Brown.

3. At all times material to this indictment, Blue Shield of Michigan was a non-profit organization which reimbursed doctors for medical care provided to Blue Shield subscribers based upon claims submitted to Blue Shield of Michigan.

4. It was a part of the scheme and artifice to defraud that Doctor William J. Brown and Dorothy Brown would and did cause forms captioned "Michigan Medical Claim Form" or "Doctor's Service Report" to be prepared, said forms indicating that certain medical services had been rendered to Blue Shield subscribers by Doctor William J. Brown, the defendant herein.

5. It was a further part of said scheme and artifice to defraud that Doctor William J. Brown and Dorothy Brown would and did submit forms entitled "Michigan Medical Claim Form" or "Doctor's Service Report" to Blue Shield of Michigan, 600 Lafayette East, Detroit, Michigan, to secure payment for medical treatment of Blue Shield subscribers rendered by Doctor William J. Brown, the defendant herein.

6. It was a further part of said scheme and artifice to defraud that Doctor William J. Brown and Dorothy Brown would and did submit forms entitled "Michigan Medical Claim Form" or "Doctor's Service Report" to Blue Shield of Michigan, representing that Doctor William J. Brown had performed certain medical services for Blue Shield subscribers on stated dates, when in truth, and in fact as the defendants well knew, the medical services were not performed on the Blue Shield subscribers on the dates specified.

7. It was a further part of said scheme and artifice to defraud that Doctor William J. Brown and Dorothy Brown would and did submit forms entitled "Michigan Medical Claim Form" or "Doctor's Service Report" as described in Paragraph 6 to Blue Shield of Michigan, 600 Lafayette East, Detroit, Michigan, by United States Mail.

8. It was a further part of said scheme and artifice to defraud that Doctor William J. Brown and Dorothy Brown would and did cause Blue Shield of Michigan to mail payments for medical services not performed on Blue Shield subscribers to Doctor William J. Brown to 8992 D Avenue, Richland, Michigan.

9. It was a further part of said scheme and artifice to defraud that Doctor William J. Brown and Dorothy Brown would and did accept payments from Blue Shield of Michigan for medical services of Blue Shield subscribers, which, in fact, Doctor William J. Brown had not performed on the dates specified as submitted.

10. On or about the 23rd day of October, 1975, in the Western District of Michigan, Southern Division, Doctor William J. Brown and Dorothy Brown, for the purpose of executing the aforesaid shceme and artifice to defraud, and attempting to do so, caused to be placed in an authorized depository for mail matter, a check addressed to William J. Brown, D.P.M. at 8992 D Avenue, Richland, Michigan. Included in the check amount was payment for medical services provided to Mildred Dreier, a Blue Shield subscriber, on August 23rd and August 26th in 1975. Specifically payment was provided for: diagnostic x-rays, right foot; fasciectomy, right root; tendon lengthening, right foot and three injections into the small joint toes, right foot.

In violation of 18 U.S.C. Sections 1341 and 2(a).

COUNT 36

1. The Grand Jury realleges all of the allegations in Count 35 of this Indictment except the tenth paragraph thereof.

2. On or about the 10th day of July, 1975, in the Western District of Michigan, Southern Division, Doctor William J. Brown and Dorothy Brown, for the purpose of executing the aforesaid scheme and artifice to defraud, and attempting to do so, caused to be placed in an authorized depository for mail matter, a check addressed to William J. Brown, D.P.M. at 8992 D Avenue, Richland, Michigan. Included in the check amount was payment for medical services provided to Blue Shield subscriber, Mildred Dreier, on May 21, 1975, and May 23, 1975 and June 2, 1975. Specifically, payment was provided for: three injections, small joint toes, left foot.

In violation of 18 U.S.C. Sections 1341 and 2(a).

COUNT 37

1. The Grand Jury realleges all of the allegations of Count 35 of this Indictment except the tenth paragraph thereof.

2. On or about the 22nd day of May, 1975, in the Western District of Michigan, Southern Division, Doctor William J. Brown and Dorothy Brown, for the purpose of executing the aforesaid scheme and artifice to defraud, and attempting to do so, caused to be placed in an authorized depository for mail matter, a check addressed to William J. Brown, D.P.M. at 8992 D Avenue, Richland, Michigan. Included in the check amount was payment for medical services provided to Blue Shield subscriber, Sharon Fisher, on April 29, 1975. Specifically, payment was provided for excision of nail edge, 5th digit left.

In violation of 18 U.S.C. Sections 1341 and 2(a).

COUNT 38

1. The Grand Jury realleges all of the allegations of Count 35 of this Indictment except the tenth paragraph thereof.

2. On or about the 21st day of July, 1977, in the Western District of Michigan, Southern Division, Doctor William J. Brown and Dorothy Brown, for the purpose of executing the aforesaid scheme and artifice to defraud, and attempting to do so, caused to be placed in an authorized depository for mail matter, a check addressed to William J. Brown, D.P.M. at 8992 D Avenue, Richland, Michigan. Included in the check amount was payment for medical services provided to Blue Shield subscriber, Dawn Fross, on December 27, 1976. Specifically, payment was provided for treatment of a lesion, 2cm, right foot.

In violation of 18 U.S.C. Sections 1341 and 2(a).

COUNT 39

1. The Grand Jury realleges all of the allegations of Count 35 of this Indictment except the tenth paragraph thereof.

2. On or about the 22nd day of May, 1975, in the Western District of Michigan, Southern Division, Doctor William J. Brown and Dorothy Brown, for the purpose of executing the aforesaid scheme and artifice to defraud, and attempting to do so, caused to be placed in an authorized depository for mail matter, a check addressed to William J. Brown, D.P.M. at 8992 D Avenue, Richland, Michigan. Included in the check amount was payment for medical services provided to Blue Shield subscriber, Nora Grindle, on April 29, 1975. Specifically, payment was provided for removal of foreign body, right foot.

In violation of 18 U.S.C. Sections 1341 and 2(a).

COUNT 40

1. The Grand Jury realleges all of the allegations of Count 35 of this Indictment except the tenth paragraph thereof.

2. On or about the 22nd day of May, 1975, in the Western District of Michigan, Southern Division, Doctor William J. Brown and Dorothy Brown, for the purpose of executing the aforesaid scheme and artifice to defraud, and attempting to do so, caused to be placed in an authorized depository for mail matter, a check addressed to William J. Brown, D.P.M. at 8992 D Avenue, Richland, Michigan. Included in the check amount was payment for medical services provided to Blue Shield subscriber, Barb Geresy, on April 26, 1975 and April 25, 1975. Specifically, payment was provided for hammer toe surgery, right foot, and diagnostic x-rays for surgery, right foot.

In violation of 18 U.S.C. Sections 1341 and 2(a).

COUNT 41

1. The Grand Jury realleges all of the allegations of Count 35 of this Indictment except the tenth paragraph thereof.

2. On or about the 22nd day of May, 1975, in the Western District of Michigan, Southern Division, Doctor William J. Brown and Dorothy Brown, for the purpose of executing the aforesaid scheme and artifice to defraud, and attempting to do so, caused to be placed in an authorized depository for mail matter, a check addressed to William J. Brown, D.P.M. at 8992 D Avenue, Richland, Michigan. Included in the check amount was payment for medical services provided to Blue Shield subscriber, Bernice Hamlin, on January 3, 1975. Specifically, payment was provided for diagnostic x-rays, left and right feet.

In violation of 18 U.S.C. Sections 1341 and 2(a).

COUNT 42

1. The Grand Jury realleges all of the allegations of Count 35 of this Indictment except the tenth paragraph thereof.

2. On or about the 3rd day of July, 1975, in the Western District of Michigan, Southern Division, Doctor William J. Brown and Dorothy Brown, for the purpose of executing the aforesaid scheme and artifice to defraud, and attempting to do so, caused to be placed in an authorized depository for mail matter, a check addressed to William J. Brown, D.P.M. at 8992 D Avenue, Richland, Michigan. included in the check amount was payment for medical services provided to Blue Shield subscriber, John Hine, on June 13, 1975. Specifically, payment was provided for surgical excision of nail edge, left foot hallux.

In violation of 18 U.S.C. Sections 1341 and 2(a).

COUNT 43

1. The Grand Jury realleges all of the allegations of Count 35 of this Indictment except the tenth paragraph thereof.

2. On or about the 14th day of August, 1975, in the Western District of Michigan, Southern Division, Doctor William J. Brown and Dorothy Brown, for the purpose of executing the aforesaid scheme and artifice to defraud, and attempting to do so, caused to be placed in an authorized depository for mail matter, a check addressed to William J. Brown, D.P.M. at 8992 D Avenue, Richland, Michgan. Included in the check amount was payment for medical services provided to Blue Shield patient, John Hine, on July 16, 1975, July 28, 1975, and August 1, 1975. Specifically, payment was provided for three visits for chemocautery destruction with surgical curettement of local lesions, left foot.

In violation of 18 U.S.C. Sections 1341 and 2(a).

COUNT 44

1. The Grand Jury reallages all of the allegations of Count 35 of this Indictment except the tenth paragraph thereof.

2. On or about the 25th day of September, 1975, in the Western District of Michigan, Southern Division, Doctor William J. Brown and Dorothy Brown, for the purpose of executing the aforesaid scheme and artifice to defraud, and attempting to do so, caused to be placed in an authorized depository for mail matter, a check addressed to William J. Brown, D.P.M. at 8992 D Avenue, Richland, Michigan. Included in the check amount was payment for medical services provided to Blue Shield patient, John Hine, on September 12, 1975. Specifically, payment was provided for: permanent resection of entire nail, both nail edges, bed and matrix, with plastic reconstruction and partial osteotomy of the distal phalanx, left foot; injection, small joint toes, left foot, and injection, small joint toes, left foot.

In violation of 18 U.S.C. Sections 1341 and 2(a).

COUNT 45

1. The Grand Jury realleges all of the allegations of Count 35 of this Indictment except the tenth paragraph thereof.

2. On or about the 23rd day of October, 1975, in the Western District of Michigan, Southern Division, Doctor William J. Brown and Dorothy Brown, for the purpose of executing the aforesaid scheme and artifice to defraud, and attempting to do so, caused to be placed in an authorized depository for mail matter, a check addressed to William J. Brown, D.P.M. at 8992 D Avenue, Richland, Michigan. Included in the check amount was payment for medical services provided to Blue Shield patient, John Hine, on September 16, 1975, September 23, 1975 and September 29,

1975. Specifically, payment was provided for visits for chemocautery destruction with surgical curettement of local lesions, right foot.

In violation of 18 U.S.C. Sections 1341 and 2(a).

COUNT 46

1. The Grand Jury realleges all of the allegations of Count 35 of this Indictment except the tenth paragraph thereof.

2. On or about the 31st day of October, 1974, in the Western District of Michigan, southern Division, Doctor William J. Brown and Dorothy Brown, for the purpose of executing the aforesaid scheme and artifice to defraud, and attempting to do so, caused to be placed in an authorized depository for mail matter, a check addressed to William J. Brown, D.P.M. at 8992 D Avenue, Richland, Michigan. Included in the check amount was payment for medical services provided to Blue Shield patient, Kristine Jeffrey, on October 14, 1974. Specifically, payment was provided for plantar fasciotomy, left foot.

In violation 18 U.S.C. 1341 and 2(a).

COUNT 47

1. The Grand Jury realleges all of the allegations of Count 35 of this Indictment except the tenth paragraph thereof.

2. On or about the 29th day of August, 1977, in the Western District of Michigan, Southern Division, Doctor William J. Brown and Dorothy Brown, for the purpose of executing the aforesaid scheme and artifice to defraud, and attempting to do so, caused to be placed in an authorized depository for mail matter, a letter addressed to Blue Shield

of Michigan, 600 Lafayette East, Detroit, Michigan, to be sent and delivered by the United States Postal Service. Included was letter specifying that Blue Shield patient, Helen Lang received medical services on December 27, 1976 consisting of the partial excision of bone phalanx.

In violation of 18 U.S.C. Sections 1341 and 2(a).

COUNT 48

1. The Grand Jury realleges all of the allegations of Count 35 of this Indictment except the tenth paragraph thereof.

2. On or about the 24th day of April, 1975, in the Western District of Michigan, Southern Division, Doctor William J. Brown and Dorothy Brown, for the purpose of executing the aforesaid scheme and artifice to defraud, and attempting to do so, caused to be placed in an authorized depository for mail matter, a check addressed to William J. Brown, D.P.M. at 8992 D Avenue, Richland, Michigan. Included in the check amount was payment for medical services provided to Blue Shield patient, Margaret Laux, on March 23, 1975. Specifically, payment was provided for removal of foreign body, right foot.

In violation of 18 U.S.C. Sections 1341 and 2(a).

COUNT 49

1. The Grand Jury realleges all of the allegations of Count 35 of this Indictment except the tenth paragraph thereof.

2. On or about the 21st day of November, 1974, in the Western District of Michigan, Southern Division, Doctor William J. Brown and Dorothy Brown, for the purpose of

executing the aforesaid scheme and artifice to defraud, and attempting to do so, caused to be placed in an authorized depository for mail matter, a check addressed to William J. Brown, D.P.M. at 8992 D Avenue, Richland, Michigan. Included in the check amount was payment for medical services provided to Blue Shield patient, Kristine Jeffrey, on November 4, 1974. Specifically, payment was provided for injection, small joint toes, left foot.

In violation of 18 U.S.C. Sections 1341 and 2(a).

COUNT 50

1. The Grand Jury realleges all of the allegations of Count 35 of this Indictment except the tenth paragraph thereof.

2. On or about the 15th day of March, 1977, in the Western District of Michigan, Southern Division, Doctor William J. Brown and Dorothy Brown, for the purpose of executing the aforesaid scheme and artifice to defraud, and attempting to do so, caused to be placed in an authorized depository for mail matter, a letter addressed to Blue Shield of Michigan, 600 Layfayette East, Detroit, Michigan to be sent and delivered by the United States Postal Service. The letter specified that Blue Shield patient, Dorothy Ockerman, received medical services on March 10, 1977 and March 15, 1977, consisting of treatment of incurvated hallux, right.

In violation of 18 U.S.C. Sections 1341 and 2(a).

COUNT 51

1. The Grand Jury realleges all of the allegations of Count 35 of this Indictment except the tenth paragraph thereof.

2. On or about the 19th day of December, 1977, in the Western District of Michigan, Southern Division, Doctor William J. Brown and Dorothy Brown, for the purpose of executing the aforesaid scheme and artifice to defraud, and attempting to do so, caused to be placed in an authorized depository for mail matter, a letter addressed to Blue Shield of Michigan, 600 Lafayette East, Detroit, Michigan to be sent and delivered by the United States Postal Service. The letter specified that Blue Shield patient, Dorothy Ockerman, received medical services on December 13, 1977 and December 19, 1977, consisting of chemocautery destruction, right foot.

In violation of 18 U.S.C. Sections 1341 and 2(a).

COUNT 52

1. The Grand Jury realleges all of the allegations of Count 35 of this Indictment except the tenth paragraph thereof.

2. On or about the 2nd day of November, 1977, in the Western District of Michigan, Southern Division, Doctor William J. Brown and Dorothy Brown, for the purpose of executing the aforesaid scheme and artifice to defraud, and attempting to do so, caused to be placed in an authorized depository for mail matter, a letter addressed to Blue Shield of Michigan, 600 Lafayette East, Detroit, Michigan to be sent and delivered by the United States Postal Service. The letter specified that Blue Shield patient, Dorothy Okcerman, received medical services on: September 26, 1977; October 3, 1977; October 10, 1977; October 17, 1977; October 24, 1977; and October 31, 1977. Treatment was purportedly for chemocautery destruction, right foot.

In violation of 18 U.S.C. Sections 1341 and 2(a).

Indictment

COUNT 53

1. The Grand Jury realleges all of the allegations of Count 35 of this Indictment except the tenth paragraph thereof.

2. On or about the 24th day of April, 1975, in the Western District of Michigan, Southern Division, Doctor William J. Brown and Dorothy Brown, for the purpose of executing the aforesaid scheme and artifice to defraud, and attempting to do so, caused to be placed in an authorized depository for mail matter, a check addressed to William J. Brown, D.P.M. at 8992 D Avenue, Richland, Michigan. Included in the check amount was payment for medical services provided to Blue Shield patient, Catherine O'Donnell, on March 31, 1975. Specifically, payment was provided for excision of nail edge simple, right foot.

In violation of 18 U.S.C. Sections 1341 and 2(a).

COUNT 54

1. The Grand Jury realleges all of the allegations of Count 35 of this Indictment except the tenth paragraph thereof.

2. On or about the 23rd of October, 1975, in the Western District of Michigan, Southern Division, Doctor William J. Brown and Dorothy Brown, for the purpose of executing the aforesaid scheme and artifice to defraud, and attempting to do so, caused to be placed in an authorized depository for mail matter, a check addressed to William J. Brown, D.P.M. at 8992 D Avenue, Richland, Michigan. Included in the check amount was payment for medical services provided to Blue Shield patient, Gloria Rodgers, on September 30, 1975. Specifically, payment was provided for a tenotomy on the third digit, left foot and an injection into the small joint toes, left foot.

In violation of 18 U.S.C. Sections 1341 and 2(a).

Indictment

COUNT 55

1. The Grand Jury realleges all of the allegations of Count 35 of this Indictment except the tenth paragraph thereof.

2. On or about the 20th day of November, 1975, in the Western District of Michigan, Southern Division, Doctor William J. Brown and Dorothy Brown, for the purpose of executing the aforesaid scheme and artifice to defraud, and attempting to do so, caused to be placed in an authorized depository for mail matter, a check addressed to William J. Brown, D.P.M. at 8992 D Avenue, Richland, Michigan. Included in the check amount was payment for medical services provided to Blue Shield patient, Gloria Rodgers, on October 31, 1975. Specifically, payment was provided for permanent resection of entire nail, both nail edges, bed, matrix with plastic reconstruction and partial osteotomy of the distal phalanx, right foot, hallux and for two injections into the small joint toes, right foot.

In violation of 18 U.S.C. Sections 1341 and 2(a).

A TRUE BILL
(s) GLADYS J. DAVEY
Foreman

(s) JAMES S. BRADY
United States Attorney

Motion

UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF MICHIGAN

UNITED STATES OF AMERICA,

vs. Docket No. 78-29M

OFFICE OF WILLIAM J. BROWN, DPM,
located on the north end of the
first floor at 8993 East D Avenue,
Richland, Michigan

MOTION FOR THE RETURN OF SEIZED PROPERTY AND THE SUPPRESSION OF EVIDENCE
(Filed: March 9, 1978)

The office of William J. Brown, by Dr. William J. Brown hereby moves this Court to direct that certain properties of which he is an owner, a schedule which is attached and marked as Exhibit B hereto, and which on the day of February 23, 1978 at the premises known as the offices of Dr. William J. Brown, 8993 East D Avenue, Richland Michigan, in the city of Richland Michigan and the Western District of Michigan, was unlawfully seized and taken from him by agents of the Federal Bureau of Investigation, one agents' name being Michael Harrell and others unknown to the petitioner, be returned to him and that it be suppressed as evidence against him in any criminal proceeding.

The petitioner further states that the property was seized under the authority of a search warrant but that search warrant lacked probable cause and that the seizure was still unlawful, please see memorandum in support of motion.

(s) JOSEPH J. JERKINS
Attorney for Petitioner (p15496)
Business Address:
525 Industrial State Bank Building
Kalamazoo, MI. 49007
Telephone: (616) 381-6646

UNITED STATES OF AMERICA
IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

vs. File No. G 79-73 Cr.

WILLIAM J. BROWN, D.P.M. and
DOROTHY BROWN,
Defendants.

MOTION FOR RETURN OF SEIZED PROPERTY AND SUPPRESSION OF EVIDENCE
(Filed: November 8, 1979)

NOW COMES the Defendants, WILLIAM J. BROWN, D.P.M. and DOROTHY BROWN, by and through their attorneys, JERKINS & HURLEY, and moves this Court to direct that certain property being patients files and all contents, belonging to the Defendants, a schedule of which is annexed hereto, and which was unlawfully taken from Defendants on February 23, 1978 at the permises known as the offices of Dr. William Brown, 8993 East D Avenue, in the City of Richland, Michigan and the Western District of Michigan, by agents of the Federal Bureau of Investigation and the Department of Health, Education & Welfare, be returned to the Defendants and that it be suppressed as evidence against the Defendants in any criminal proceedings, and alleges and says as follows:

1. That on February 23, 1978 at approximately 3:30 p.m. agents of the FBI and Department of HEW served a search warrant on Dr. William J. Brown at his office (see copy of search warrant attached as Exhibit A).

2. That at that time the agents seized approximately 1676 files and records being all of Dr. Brown's records for

patients that he had in his possession going back as far as twenty-five years (see copy of listed files attached as Exhibit B).

3. That said search and seizure was conducted in a heavy-handed manner in apparent disregard for the constitutional principle that one is presumed innocent until proven guilty.

4. That Dr. Brown was without any records from that date until approximately March 6, 1978 when some copies of his records were returned upon request by the undersigned attorney.

5. That subsequently on five occasions a total of approximately 936 copies of files were returned to the Defendants.

6. That the Defendants have a great interest in, and an obvious need for, the material seized from the office in that Dr. Brown has an active medical practice and can not continue that practice in the manner to which his patients are accustomed without his files.

7. That the government has returned only copies of the history and treatment form and that the government is wrongfully withholding the originals of same, and the originals of any and all other documents, records, x-rays, statements, and forms contained within those files seized.

8. That notwithstanding that the records and files were seized pertaining to alleged violations of 18 USCA Section 1001, with a five-year statute of limitations, files were seized going as far back as twenty-five years thereby unlawfully depriving the Defendants of files which could not be relevant to the investigation.

9. That the government conducted a general search repugnant to the United States Constitution.

10. That it is contrary to the first principles of justice to allow such a search through all records of the Defendants, whether relevant or irrelevant, and in the hope that something incriminating may turn up.

11. That the affidavit in support of the warrant lacked probable cause for the issuance of the search warrant to seize almost 1700 files going back over a twenty-five year period.

12. That the government can and has not demonstrated any further need or justification for withholding all the files that have not been returned nor any justification for not returning the originals of any and all files seized and the documents contained therein.

13. That the government is impeading the Defendants' rights to prepare their defense by failing to return the originals of any and all documents that were seized and are now in the government's possession.

WHEREFORE, the Defendants pray that this Court grant their motion for return of the originals of any and all files seized and documents therein which remain in the possession of the government, and grant their motion for the suppression of the use of said files as evidence at any criminal proceeding pursuant to FRCP Rule 41(e).

DATED: November 7, 1979

JERKINS & HURLEY
BY: (s) Joseph J. Jerkins
Business Address:
525 Industrial State Bank Bldg.
Kalamazoo, Michigan 49007

Government's Response to Motion

UNITED STATES OF AMERICA
IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

vs. No. G79-73 Cr.

WILLIAM J. BROWN, D.P.M. and
DOROTHY BROWN,
Defendants.

GOVERNMENT'S RESPONSE TO DEFENDANTS MOTION TO RETURN SEIZED PROPERTY AND SUPPRESSION OF EVIDENCE
(Filed: November 26, 1979)

Now comes the United States of America by and through its attorneys, James S. Brady, United States Attorney for the Western District of Michigan, and Agnes Kempker-Cloyd, Assistant United States Attorney, and state to this Honorable Court that the defendants' motion has been previously considered and denied by Honorable Noel P. Fox on May 24, 1978.

Dated: November 26, 1979

Respectfully submitted,
James S. Brady
United States Attorney
(s) AGNES KEMPKER-CLOYD
Assistant United States Attorney

**UNITED STATES OF AMERICA
IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MICHIGAN,
SOUTHERN DIVISION**

UNITED STATES OF AMERICA,
Plaintiff,

vs. No. G79-73 Cr.

WILLIAM J. BROWN, D.P.M. and
DOROTHY BROWN,
Defendants.

**GOVERNMENT'S MEMORANDUM IN RESPONSE
TO DEFENDANT'S MOTION TO
RETURN SEIZED PROPERTY AND
SUPPRESSION OF EVIDENCE**
(Filed: November 26, 1979)

II. Government's Answers to Defendant's Allegations

1. True
2. True as to the approximate number of files seized; false as to this being all Dr. Brown's files.
3. False
4. True
5. True
6. False, Dr. Brown has received Xerox copies of his medical charts which include treatment history as well as billing information.
7. True as to the return of Xerox copies of the history and treatment forms, False as to the allegation of "wrongful" withholding by the Government of the originals.
8. True, some of the files seized included patients who had started seeing the doctor 25 years ago; however,

they had continued to see the doctor in the mid '70s and are therefore relevant to the investigation.

9. False
10. Legal Argument
11. False
12. False
13. False

Respectfully submitted,
James S. Brady
United States Attorney
(s) AGNES KEMPKER-CLOYD
Assistant United States Attorney

Dated: November 26, 1979

Motion for Reconsideration

UNITED STATES OF AMERICA
IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

vs. File No. G 79-73 Cr.

WILLIAM J. BROWN, D.P.M. and
DOROTHY BROWN,
Defendants.

MOTION FOR RECONSIDERATION OF DEFENDANTS' MOTION FOR RETURN OF SEIZED PROPERTY AND SUPPRESSION OF EVIDENCE
(Filed: March 21, 1980)

NOW COMES the defendants, WILLIAM J. BROWN, D.P.M. and DOROTHY BROWN, by and through their attorneys, JERKINS & HURLEY, and moves this Court to reconsider its decision in denying defendants' Motion for Return of Seized Property and Suppression of Evidence, and in support thereof alleges and says as follows:

1. That on February 28, 1980 this Court entered a CONSOLIDATED OPINION AND ORDER ON PENDING PRE-TRIAL MOTIONS.

2. That in that opinion and order the defendants' Motion for Return of Seized Property and Suppression of Evidence was denied.

3. That the Court in its order relied upon Chief Judge Noel Fox's earlier decision that the search of the defendants' records was not unlawful.

4. That the Court on page 21 of its decision and order stated that "the court neither perceives nor is presented with any reason to reopen Judge Fox's decision . . .".

5. That the decision rendered by Judge Fox in this matter cites no case specifically on point, and no 6th Circuit Court of Appeals case as authority.

6. That the yet to be published opinion in United States v. Abrams, F 2d (Ca 1, 1980), decided January 22, 1980, appears to be squarely on point and controlling.

7. That in light of this case decided prior to this court's decision on the defendants' motion, the defendants are entitled to a reconsideration of their motion, and further, the defendants submit that their motion should be granted based upon this new law.

WHEREFORE, the defendants pray that this court grant their motion for reconsideration and further grant the relief requested in defendant's Motion for Return of Seized Property and Suppression of Evidence.

DATED: March 21, 1980

JERKINS & HURLEY
By: (s) Charles A. Anderson
Business Address:
525 Industrial State Bank Bldg.
Kalamazoo, Michigan 49007

Judgment and Probation/Commitment Order

United States of America vs.

United States District Court for

WESTERN DISTRICT OF MICHIGAN

DEFENDANT: DOROTHY BROWN

DOCKET NO. G 79-71 CR

JUDGMENT AND PROBATION/COMMITMENT ORDER

COUNSEL

In the presence of the attorney for the government the defendant appeared in person on this date — MONTH: June DAY: 13, YEAR: 1980

[ ] WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

[X] WITH COUNSEL Joseph J. Jerkins (Name of counsel)

PLEA

[X] GUILTY, and the court being satisfied that there is a factual basis for the plea, [ ] NOLO CONTENDERE, [X] NOT GUILTY

FINDING & JUDGMENT

There being a [ ] verdict of [ ] NOT GUILTY. Defendant is discharged [X] GUILTY. to Counts 1-3,7-9,11-13,15-23,27,28,30, 32-36,46,49,54 and 55.

Defendant has been convicted as charged of the offense(s) of Presenting false claims against the United States. 18 USC 287;2(a) False statements to Agency of the United States. 18 USC 1001;2(a) and Devising scheme and artifice to defraud the United States. 18 USC 1341; 2(a) .

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

ONE YEAR, indeterminate, under 18 U.S.C. 4205(b)(1).

Execution of said sentence of imprisonment is hereby suspended and defendant placed on Probation for a term of TWO YEARS.

SPECIAL CONDITIONS OF PROBATION

Defendant shall pay a Fine to the United States in the sum of One Hundred Dollars ($100.00)for each of the thirty(30) counts, enumerated herein, on whichche was found guilty, thus making a total Fine in the sum of Three Thousand Dollars($3,000.00), to be paid at the rate of One Hundred and Twenty Five Dollars ($125.00) per month until fully paid.

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this [illegible] be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

CERTIFIED AS A TRUE COPY ON

THIS DATE

BY

( ) CLERK

( ) DEPUTY

SIGNED BY

[ ] U.S. District Judge

[ ] U.S. Magistrate

Benjamin F. Gibson

Date

Notice of Appeal

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

UNITED STATES

v. Docket Number 79-73 CR

DOROTHY BROWN

Benjamin Gibson
District Court Judge

NOTICE OF APPEAL
(Filed: June 23, 1980)

Notice is hereby given that DOROTHY BROWN appeals to the United States Court of Appeals for the Sixth Circuit from the (X) Judgment (X) Order ( ) Other (specify) entered in this action on June 13, 1980.

LITTLE & GEARY
By (s) James H. Geary
Counsel for Appellant
Business Address:
Little & Geary
107 W. Michigan Ave.
Kalamazoo, MI 49007
Telephone: (616) 344-1575

Joseph J. Jerkins
Counsel for Appellant
Business Address:
729 Academy Street
Kalamazoo, MI 49007
Telephone: (616) 381-6666

Date June 19, 1980

EXCERPTS FROM THE RECORD

Excerpts from the U.S. Attorney's remarks during argument of pretrial motion.

(11)

* * *

MRS. KEMPKER-CLOYD: The only information, let's put it this way, he's got the files which would be the bulk of the information. The bulk of the Government's case will be the testimony and the Defendants' medical charts on that medical chart both the treatment and things given to the patients and billings and clippings. * * *

(52)

* * *

The second thing that has to be shown is specific prejudice to the Defendants' case. That's—well, I don't think that can be shown. Several cases have held that you can't just allege well, the memory of the Defendant gets dimmer or something like this. That, it has to be something very specific. We did not, certainly, delay the case. As you are aware, you were assigned the case recently and have tried to move it along as quickly as possible. So, the two year delay has not been—the two years would not be a correct figure because the time—the time should go from the time the Grand Jury returned the indictment and the figure that—that's when—we should go not the two year figure, it is the time the indictment was received until we originally first started working on the case. So that would not be a fair figure and it would not be a fair assessment of preindictment delay from the time we got the search warrant until the time that we indicted and I don't think there was a great deal of time. Therefore considering the amount of records, the amount of individuals we brought in front of the Grand Jury every single month. I will respond, try to

respond more (53) accurately in my brief, as soon as possible.

* * *

(58)

* * *

MRS. KEMPKER-CLOYD: Probably one thing further to stop any arguing on the things, I would like to suggest setting up some kind of time with Mr. Jerkins with all these boxes of materials I have sent him so far so we can check back against what I have to make sure he has everything since he says that five files are missing, I want to make sure he has every item. The only way I suppose we can do that is to go through it manually myself. We had the secretaries and the agents Xeroxing for six days and obviously, I don't want to sign anything if it's not there. I would like to check every piece myself.

* * *

(104)

* * *

MR. JERKINS: Yes, your Honor. I was just going to do that. It is my understanding after our discussion in chambers with Mrs. Cloyd, Mrs. Cloyd, your Honor and myself that in the case at bar the one which is pending before your Honor, the United States of America versus William J. Brown, DPM and Dorothy Brown that in that case which the search warrant, the Court, of course, had a copy of and the affidavit thereto that it was executed on the date that it shows on the return at the time of the execution approximately 1,676 files were seized by the Government pursuant to this search warrant. That, these were not all of the files that there were approximately between 50 percent and 2/3 of all the files that were present at that time. That, apparently according to information which Mrs. Cloyd has advised me and in conferring with my clients, they understood to be this way all the files that were seized over 1,676,

they were seized on the theory that they contained one or more insurance papers or claims within them.

In other words, it didn't matter if it was (105) a Medicaid/Medicare, Blue Cross/Blue Shield or private insurance companies such as Aetna, Traveler's, AAA, whatever, as long as there was an indication of an insurance document in it, that was the basis of seizing those files. That, the ones that were left were those which did not contain any evidence of any insurance claim or paper in it. That then these files were taken by Mrs. Tenaka at that time Miss Flannery back to Chicago and at that time they were examined by the United States Government. I believe that's the stipulated fact unless there is something that I have omitted.

THE COURT: Mrs. Cloyd?

MRS. KEMPKER-CLOYD: That was fine, your Honor, the stipulated facts.

* * *

(122)

Excerpts from the Testimony of Agent Harrell

Q. Mr. Harrell, where do you live?

A. I live in Kalamazoo, Michigan.

Q. How are you employed?

A. I'm employed as an FBI agent.

Q. How long have you been an FBI agent?

A. Nine years.

Q. And, do your duties at times require you to execute search warrants and gather evidence?

A. Yes ma'am, they do.

Q. As part of your official duties have you had occasion to come in contact with the Defendants Dorothy Brown and William J. Brown?

A. Yes ma'am, on one date.

* * *

Q. Can you describe the circumstances under which you came into contact with the Defendants?

A. Yes ma'am. On February the 23rd, 1978 I received a (123) telephone call from Assistant United States Attorney Don Davis from your Office here. * * *

* * * After that telephone conversation I met with HEW investigator Miss Flannery in Richland, Michigan at approximately 3 o'clock on that same date.

Q. What, if anything, did you do?

A. Okay, when I met Miss Flannery, she gave me a search warrant which I read and explained to me that we would—she would like my help in seizing some medical records and files from the office of Dr. Brown in Richland, Michigan. We went over to Dr. Brown's office. Neither he nor his wife were there at the time. There was an assistant in the office, a clerical employee. Miss Flannery explained to her the nature of our being there. I believe she then called the Browns' home to try to tell them that we were there. Mrs. Brown came down to the office. Dr. Brown was someplace else and was not in contact at that time. And, I think Miss Flannery explained again to Mrs. Brown this time what the nature was and what the search warrant was for and she then made efforts (124) to contact Dr. Brown by phone, finally getting a hold of him and he came to the office also.

We explained—Miss Flannery explained again to Dr. Brown what we were there for and then we started—we started to pull some patient files that were contained on the subpoena.

Q. Okay. Did you make a record of what was seized?

A. Yes. We made an inventory of all of the patient files that were taken out of Dr. Brown's office on that date.

Q. And, did you sign that inventory?

A. I did, signed the return on the search warrant.

MRS. KEMPKER-CLOYD: Your witness.

CROSS EXAMINATION

BY MR. JERKINS:

Q. Mr. Harrell, how many people went to the doctor's office?

A. Initially there were three of us, Miss Flannery, myself and another agent who worked with me named Jerry Alexander, the usual spelling.

Q. So, two agents and Miss Flannery from HEW?

A. Initially, yes.

Q. All right. Now, as I understand it then you went there with a search warrant to obtain certain records?

A. Yes, to assist Miss Flannery.

Q. That's correct, to assist, that's the reason you were (125) there?

A. Yes.

Q. Now, how long were you there, Mr. Harrell?

A. Well, we got at the office at approximately 3:30 and we left there at approximately 7 p.m.

Q. So, you were there at least three and a half hours then getting records?

A. That's correct.

Q. Do you remember the number of patient files you obtained?

A. No. You are talking about the numerical number?

Q. Yes.

A. No.

Q. Do you know how many pages is your return?

A. I can look at that and tell you.

Q. Please do so.

A. Okay. There are 13 pages.

Q. Thirteen pages and those are what size pages, Mr. Harrell?

A. They are just the standard typewriter page.

Q. What's the standard typewriter page, do you know?

A. No, I don't, I think probably 8 by 11.

Q. Okay. Now, if I were to tell you that I counted those and I counted 1,676 files, would you believe that that would be a close and accurate figure?

A. I would think it would be around 1,000, that's correct.

(126)

A. I said 1,676, closer to 2,000 files?

A. Are you talking about information for that?

Q. I'm asking you if you believe that's correct.

A. I wouldn't have any way of knowing if that's correct, unless I counted them.

Q. Would you like to count those so you can tell the jury the number of files that are on that search warrant?

A. That's up to you, if you want me to, I will.

* * *

THE COURT: Can you stipulate that it is about that figure?

MRS. KEMPKER-CLOYD: I will stipulate that it's around that figure.

* * *

(127)

* * *

Q. Now Mr. Harrell then I take it that while you were there obtaining these files that you went to the file cabinet and you started pulling these files, which were in alphabetical order, is that correct?

A. Yes sir, by drawer.

Q. Each drawer by drawer?

A. Yes.

Q. All right. And, to your knowledge did you obtain all of those files that were there?

A. Yes sir.

Q. So that you took all of the doctor's files then, is that correct?

A. No. We did not take all of his files. Miss Flannery would stipulate that there were certain files that she did not want as we were going through and we left those (128) files. That's my recollection.

Q. That's your recollection. Now, do you recall how it was that she told you which files not to take?

A. As we would open a file, she would ask if a certain document or x-ray or something were there or a claim form. If it was there, then she'd say you need that one and we would take that one.

Q. Can you be a little more specific as to what she said?

A. No, I can't because I don't remember.

Q. So, all you recall is that Miss Flannery said certain files you would not take?

A. It would depend on what was in the file as we opened the jacket.

Q. So, you actually opened every seal, file that was in the doctor's office then?

A. This was more than one person. I did for my part. There were other people helping with pulling files and I can't testify to what they did.

Q. All right. But, was it your understanding that is the general procedure that which you were following?

A. That was the general procedure.

Q. All right. And, who was pulling files, by the way?

A. Well, special agent Alexander and when we realized the volume and the length of time that we would be there. (129) there were two other agents in Kalamazoo that date conducting a police school. I called them from Dr. Brown's office to ask them just for their physical help as far as to try to pull. One was Agent, a Bill Keith from the Grand Rapids office and another, Fred DeWitt, D-e-W-i-t-t from our Benton Harbor office. They arrived after we were there some hour or two later and helped us with the inventories.

Q. So, it took four agents then and Miss Flannery to go through these files and to gather up the over 1,600 files then?

A. That's correct.

Q. How many boxes did this fill up or how did you transport them?

A. Okay, the files we put into cardboard boxes which were then put into a car which was leased by Miss Flannery from Chicago. The actual number of boxes and I couldn't—I can't tell you because again, I only carried a portion of them, but we filled up a trunk and a back seat with cardboard boxes.

Q. And, that's of one car you filled up the entire trunk and back seat of this same car?

A. More or less yes sir.

Q. All right. And, they were all in Miss Flannery's car?

(130)

A. That's right.

Q. Then, what happened after all these boxes or files were loaded up in her car?

A. We left.

Q. And she left with all the files?

A. Yes sir.

* * *

(133)

Excerpts from the Testimony of Deirdre Flannery-Tenaka

DIRECT EXAMINATION

BY MRS. KEMPKER-CLOYD:

Q. Would you state your name for the Court and jury and spell your last name for the court reporter?

A. My name is Deirdre Tenaka. The spelling for the first name is D-e-i-r-d-r-e Tenaka T-e-n-a-ka-.

Q. Mrs. Tenaka, where do you live?

A. I live in Chicago, Illinois.

Q. Are you married?

A. Yes I am.

Q. And, what was your name prior to your marriage?

A. Flannery.

Q. And, how recently have you been married?

A. I got married July 14 of 1979.

Q. And were you employed by the Department of HEW?

A. Yes I was employed with the Department of HEW for seven years. I terminated my employment there in November of 1978.

Q. What were your responsibilities and duties with the Department of HEW?

A. I was a protective services specalist with the department (134) and as such I was responsible for investigating complaints filed by beneficiaries or other persons concerning services provided by health care professionals and health care institutions. That is doctors, nursing homes and laboratories, et cetera.

Q. Would you relate to the jury your educational background?

A. I obtained a Bachelor's degree from DePaul University in 1971 and I obtained a law degree from DePaul University in 1976.

Q. Okay, what was your undergraduate studies?

A. I majored in secondary education and history.

Q. And, did you pursuant to your investigation regarding this case come into contact with the Defendants, Dr. and Mrs. Brown.

A. Yes I did.

Q. Okay, when was that?

A. I believe it was on Feburary 23rd, 1978.

Q. And, where was that?

A. That was at the doctor's Richland office at 8992-D Avenue in Richland.

Q. And, what were you doing there?

A. I accompanied FBI agents who were executing a search warrant.

Q. Can you tell us what happened, when you arrived there?

(135)

A. Well, when we first arrived at the office, we went in through the front door and up through the reception area and the door into the office area was locked. So, we went around the back way, knocked on the door and an office girl named Cari opened the door. I explained our purpose for being there and she said that she wanted to call Dr. and Mrs. Brown.

Q. Okay. Did you let her make the call?

A. Yes. She called, I believe, the Brown's home and talked to Mrs. Brown.

Q. Did you seize any records prior to her making the call?

A. No, we did not.

Q. And, what happened after that?

A. Mrs. Brown arrived at the office herself. Dr. Brown was not there to begin with and we explained again our purpose for being there to her.

Q. Did you seize certain records?

A. Yes we did.

Q. Okay. What kind of records did you seize?

A. We seized patient medical files and the way they are kept in white manila envelopes with patient's names on a tab on the top. Inside the envelopes they usually there is a medical chart and insurance claims forms and in some charts were miscellaneous medical records such as (136) operative reports, laboratory results, x-rays, that sort of thing, authorities to operate.

* * *

(158)

* * *

CROSS EXAMINATION

BY MR. JERKINS:

Q. Mrs. Tenaka, when did you first begin working on this particular case?

A. I believe that it was originally in November of 1976.

Q. November of 1976. Now, I take it that's when it was assigned to you?

A. No. It was assigned to me shortly after I joined the Office of Program Integrity, which was in a different branch.

Q. In a different branch?

A. I believe it was assigned to me in April of '76.

Q. April of 1976, it was assigned to you?

A. Yes sir.

Q. Now, let's just back up a little bit. You stated that (159) you previously worked for HEW, that's Health Education and Welfare?

A. That's correct.

Q. That you left there in November of '78?

A. Correct.

Q. But you are still employed by the Federal Government, is that correct?

A. Yes I am.

Q. And what branch are you in now?

A. The United States Department of Labor.

Q. All right. And, are you investigator there or what?

A. Yes, I am a criminal investigator for the office of Inspector General.

Q. All right. Now, for—you had graduated in 1976, I believe you stated from law school, is that correct?

A. That's correct.

Q. What month was that?

A. That was in February, 1976.

Q. In February, 1976, okay. First or last part of February?

A. I believe I graduated February 2nd.

Q. And, where did you go to work after that?

A. I was already employed with Health Education and Welfare and going to evening school.

Q. I see. And I take it then that you went into the program (160) integrity in April of '76?

A. At the very latter part of March of 1976.

Q. Very latter part, all right. And this case, you say was assigned to you when in April?

A. Sometime early in April of 1976.

Q. Is it a fair conclusion that this your first investigation, this case?

A. No.

Q. You mean you had—

A. As I said, I started the investigation in February of '76. I worked on other cases after it was assigned to me.

Q. Well, it was assigned to you in April you said?

A. Correct.

Q. Okay. Are you saying that you didn't do anything on it for seven months?

A. I may have written some letters, but I really can't testify that I did do anything on it.

Q. Okay. So then in November of 1976 you began the investigation, is that your testimony?

A. I began, yes.

* * *

(163)

* * *

Q. Now, you have been characterized, Mrs. Tenaka, as the principal investigator in this case. By that do we assume that you were in charge of this case?

A. The case was assigned to me, while I was with the Department of Health, Education and Welfare.

Q. Do we assume then that you were in charge of this case?

A. That would be correct.

(164)

Q. All right. Now, did you have other investigators to utilize in this case?

A. No, not while I was employed there, no.

Q. So, you were the only investigator or is that what you are telling the jury?

A. Yes.

Q. All right. Now, on an average, let's say an average week, a 40 hour week?

A. If not more.

Q. All right.

A. Usually more.

Q. What percentage of your time weekly would you devote to this case from the time that it was assigned to you, if you can give us an average?

A. It varied. It would be impossible to pinpoint down like if you, for instance, could give me a period of time, I could probably give you a better idea of percentage of time.

Q. All right. When did you conclude your investigation on this case? In other words, when did you finish?

A. I believe the matter was referred to completed to the U.S. Attorney's office, I think in June of 1978.

Q. June of 1978 you think?

A. Yes.

(167)

Q. Okay. Now, you said that if I gave you some time span you might be able to tell the jury, let's take say the year of 1977. Now, on the average how much of your time each week would you devote to this case percentage-wise?

A. Okay. I think that when I devote time to the case, it was usually a complete week. So, I think that probably three or four weeks would be the total amount of time I devoted with occasional follow-up to where I was attempting to get additional claims, you know, in 1977 would occasionally follow up. That probably would have taken no more than one or two hours each week on an average.

Q. So, you are saying that you would think three full weeks that you devoted on it plus an average of maybe a couple of hours a week the rest of the time?

A. That's to the best of my recollection.

Q. How about in the year of 1978, when you worked on it?

A. Okay, that took much more time. That took, I'm estimating now, but I would imagine it would take about 15 weeks.

Q. About 15 full weeks in the year of 1978?

A. Yes. I'm just roughly estimating.

Q. I understand, it's an educated guess.

A. Uh-huh.

Q. All right.

A. That's right.

(168)

Q. All right. Now, in Feburary of 1978 you have testified that a search warrant was obtained and records were seized from the doctor's office and on that particular day, as you have already heard the testimony, Agent Harrell testified that he was requested to assist in the execution of that search warrant and also Agent Jerry Alexander and, of course, in addition to that when they realized, as you already heard from Agent Harrell's testimony, Agent Harrell contacted two other FBI agents to assist because of the voluminous number of records. Now, you agree with all that testimony, do you not?

A. Correct.

Q. All right. Now, would you tell the jury what happened when you arrived there? I believe you have already stated that there was one clerk who was there in the office and the office was closed, is that right?

A. That's correct.

* * *

(175)

* * *

Q. Now, how many hours were you there on the taking of the files?

A. I recall being there from 3:30 in the afternoon to approximately 7:30. However, I don't think that we started pulling charts until at least, you know, around 4 o'clock.

(176)

Q. And so, this would be all of the agents and yourself getting all of these files, is that right?

A. No. The other two agents probably didn't get there before 5 or 5:30.

Q. All right. Now, all of the—what—tell the jury what procedure you used when you started to pull these files and charts, what did you do?

A. Well, our basic tool was the search warrant which provided for patient ledgers, charts, insurance forms, patient medical charts and day sheets. We were advised that the patients—

Q. I don't want what you were advised, I want what you did.

A. Okay. We didn't search for the day sheets. The patients' medical charts were—we did as we went to the file cabinets. We looked in the file to see how the files were organized. We pulled the ones that had insurance forms and medical charts in the file.

Q. Let me ask you this, when you went to the files, how were they filed?

A. The files were alphabetical with the exception of a couple of claims on Mrs. Brown's desk and I didn't personally check Dr. Brown's desk. There were some claims there. And, in addition there was one drawer in Mrs. Brown's desk which had a couple of folders in there labeled with some (177) material on it like material on a couple of different nursing homes. I don't recall offhand the names.

Q. All right. Now, when you saw these were filed alphabetically what then did you do to each file? Take the very first file, what did you do to it?

A. Okay. The first files, the one we had this organized was that the first file, we went through, showed them what

insurance forms looked like and medical forms looked like and Medicaid forms looked like and pulled those files. After the agents, the other agents I believe knew what we were looking for, I wasn't around, they would hand me the files that they were pulling out of these drawers because we had to do inventory before we left so the Defendants would know what was being taken. So, I started typing the names.

When the second agents got there because I was getting behind, they were pulling them faster than I could type, when the second agent got there, he sat down and he started to type out, okay. And, that went on for a while except that he was very slow and I think kind of inaccurate. And so, the doctor volunteered to take his place so that he could pull additional charts. So as a result, there were four agents going through pulling out the charts that had, you know, like medical charts in the (178) files and insurance claims forms. We did not attempt to separate the medical charts from their folders.

Q. Now, what was being typed is just the names, the patients, isn't that correct?

A. That's correct.

Q. So in other words, the entire file was taken then as reflected by the names and so on on the return to the search warrant?

A. The files were taken intact, yes.

Q. That's right. Now these files you knew and you determined were the files that were kept by Dr. and Mrs. Brown in the ordinary course of their business, is that correct?

A. The files were found in the business, yes.

Q. All right. So, you knew that these were the business files of Dr. and Mrs. Brown as they pertained to the patients?

A. Yes.

Q. And so, for all the names that were put onto this return, you took all those files and whatever was in them, right?

A. Correct.

Q. Now, you are not telling the jury that the only items that were in those files were the patients' charts, are you?

A. No. Within each file there was, you know, we tried to pull only those that had insurance forms in there, Medicare, (179) Medicaid, Blue Cross Blue Shield. Occasionally in the files there would be like I mentioned earlier, when Mrs. Cloyd was examining me, there would be x-rays. There would postoperative reports, some EKG laboratory reports, some authority reports, authority to operate. Occasionally there would also be letters or correspondence concerning bills and I think a couple of charts contained postcards in them as well.

Q. All right. So, that whatever is in the file then you took because it was there and the file had some reference to insurance, correct?

A. Correct.

Q. Now, there was no time limit placed upon the insurance, was there? In other words, all the standard was if there is insurance in there, you would take the file?

A. That's right. We made no attempt to identify time periods.

Q. So it could have been 25 years ago or could have been last week at that point, as far as you knew?

A. I can say for a fact that we didn't find any insurance claims forms in the files that were, let's say, older than I think 1966.

Q. All right. So, that went back, obviously some 12 years then?

A. Those were very rarely that we saw any claim forms that (180) were dated at least from '72 or '73.

Q. All right. Now, you have already heard the stipulation that the number of files on the return was about 1,676. How many files did you leave that you did not take?

A. We did not count the number of files that were left. I would say approximately one-half of the files were left there.

Q. You think about one-half?

A. That, I'm just approximating. There was no attempt to determine how many files were left behind.

Q. All right. Now, when these files were taken, as you have already heard from Agent Harrell, they were placed in cardboard boxes and then put into your trunk and the back seat of the vehicle that you had, correct?

A. Correct.

Q. All right. Then, what did you do with those files?

A. I brought them back to Chicago.

* * *

(181)

* * *

Q. All right. Now, when you took all these files and you say you took them back to Chicago, what did you do with (182) them when you got back to Chicago?

A. Well, the first thing I did was I think four crate boxes and took them out of the boxes and put them in filing cabinets, locked filing cabinets. Then I started to go through them.

Q. You started to go through them, did you go through all of the files?

A. Yes.

Q. Anyone else go through the files?

A. No.

Q. Just you?

A. At that time, yes.

Q. All right. And then, after having gone through the files then did you go out and talk to patients and other people?

A. Well, I returned the files as, you know, I got finished with them, ones that were not really pertinent to the investigation were returned and after I completed that process, yes I did go out and talk to additional patients. But, that was not the first time I had talked to patients on this case.

* * *

(190)

* * *

THE COURT: Maybe you can get her to specify a time, Mr. Jerkins.

Q. When did you go through all the files?

A. I believe my review of the files was completed by May of 1978 or June of 1978.

* * *

(199)

Q. All right. So, that's less than 30 days after Exhibit 24D is alleged to have been signed, is that right?

A. That's right.

Q. Now, typed at the very bottom where there is a blank box, it says other problems, be brief but specify. There's some typing in there, isn't there?

A. Yes there is.

Q. Would you read that to the jury, please?

A. It says other problems to be brief but specific and then; and in different type of writing it says please be advised that claims submitted on 10-13, '75 and 10-21-75 were incorrectly completed. The procedure code 0232 was billed for $180. It should have had—should have been—excuse me, procedure 0230 for $45. We have not received any payment to date. We are attaching new completed claim form. Parenthesis patient signature was on the original. Close parenthesis.

Q. All right. So, that indicates that a document prepared by Dr. Brown's office, doesn't it?

A. Yes, I would assume.

Q. All right. And in fact it relates exactly to the indictment, doesn't it, as to that particular claim which the Government alleges was fraud, is that correct?

A. It relates to that claim and another claim.

(200)

Q. All right. The other claim as you know from looking at the file is exactly the same particular service that was rendered on 10-6-75, wasn't it?

A. Yes it is.

Q. All right. So, there is a letter that shows that there was a mistake and is sent in before any payment because it says we haven't received any payment and it is correcting a mistake in the code numbers, isn't it?

A. That's correct.

Q. All right. That explains that count, doesn't it?

A. Taking this piece of evidence by itself, it would appear to explain the count.

* * *

(254)

* * *

Excerpts from U.S. Attorney's Argument on Motion During Trial

An investigation of this type, the amount of records that were involved in the case that was presented to the United States Attorney's office was huge and I parried that case down to 55 counts. And, that's to the—inures to the benefit of the Defendant, not (255) against the Defendants. That, I sat and looked and chose the 55 best counts by no means was the fraud that was involved limited to the 55 counts. We presented to—we—I took that—we went through with the patients and that was not a long period of time. In fact, I didn't even have the case first. It was first with a different U.S. assistant attorney. I wasn't on board, when the case was presented and transferred to me. And, I sat down in the first place to insure the rights of everybody that's accused because they are presumed innocent and went through and presented what I thought was the best to the Grand Jury. And, they returned 55 counts.

He then goes through and this Grand Jury met on 5-79, 6-79, 7-79, 8-79. On 9-79 they heard a different matter. I was prepared to try to prepare the indictment and then on 10-79, I prepared the indictment. When you count the amount of patients that went through that Grand Jury, the amount of documents that that Grand Jury saw, I think that it was done in a most speedily type of way.

Also, a lot of this would not inure to the Government's benefit for delay. The Government lost many counts it couldn't even present to the Grand Jury

EXCERPTS FROM DEFENDANT-APPELLANT'S BRIEF ON APPEAL

* * *

ISSUE PRESENTED

"Whether the documentary evidence introduced against Defendant should have been suppressed because it was obtained under a general warrant, in violation of the Fourth Amendment to the Constitution.

* * *

"A nearly identical case was presented in *US* v *Abrams*, 615 F2d 541 (1st Cir, 1980).

* * *

"An almost identical situation was presented in *Application of Lafayette Academy, Inc*, 610 F2d 1, 3 (1st Cir, 1970).

* * *

Affidavit for Search Warrant

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA

vs.

Docket No. 77-04451-01
Case No.

The Professional Offices of Doctors Maurice Abrams, Abraham London, Peter Braun, and Abrams, London and Associates, Inc., which are contained within a three-story red brick building located at 25 Boylston Street (Rte. 9) Newton, MA said building being physically located on the Newton-Brookline line and bearing a sign "Chesnut Hill Medical Center".

BEFORE LAWRENCE P. COHEN, Boston

AFFIDAVIT FOR
SEARCH WARRANT
(Filed: April 20, 1977)

The undersigned being duly sworn deposes and says:

That he has reason to believe that (on the premises known as) the Professional Offices of Doctors Maurice Abrams, Abraham London, Peter Braun, and Abrams, London and Associates, Inc., which are contained within a three-stroy red brick building located at 25 Boylston Street (Rte. 9) Newton MA, said building being physically located on the Newton-Brookline line and bearing a sign "Chestnut Hill Medical Center", in the District of Massachusetts there

is now being concealed certain property, namely evidence of a crime, to wit:

certain business and billing and medical records of patients of Doctors Abrams, London, and Braun, and Abrams, London and Associates, Inc. which show actual medical services performed and fraudulent services claimed to have been performed in a scheme to defraud the United States and to submit false medicare and medicaid claims for payments to the United States or its agents; in violation of Title 18, United States Code, Section 1001.

And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows:

SEE ATTACHED AFFIDAVIT

(s) PAUL M. CONRAD
Special Agent FBI

Sworn to before me, and subscribed in my presence, April 20, 1977.

(s) LAWRENCE P. COHEN

AFFIDAVIT

I, Paul M. Conrad, Special Agent, Federal Bureau of Investigation, being duly sworn, do hereby depose and say as follows:

On or about April 15, 1977, Brian J. McMenamin, Health Insurance Program Specialist, Bureau of Health Insurance, Department of Health, Education, and Welfare, stationed in Boston, Massachusetts, advised that:

A. Ms. Erica Pascal, a former employee of Abrams, London and Associates, Inc., responsible for preparing

medicare forms to be submitted for payment on behalf of Maurice Abrams, M.D., Abraham London, M.D., and Abrams, London and Associates, Inc., in an affidavit to the Department of Health, Education, and Welfare stated that Doctors Abrams and London would add many tests to the billing back of patient's laboratory schedule that were never performed and that Doctors London and Abrams would add additional tests to the medicare forms in order to secure additional payments. Ms. Pascal further stated that the patients' medical records which are separate from the billing records do not list the services falsely billed nor the false diagnoses. Ms. Pascal further stated that the laboratory itself could not have physically performed all of the tests billed. Ms. Pascal also stated that on occasion she was instructed to trace the patient's signature from the record or to sign the patient's name and in parenthesis add "By daughter" or something similar.

B. Ms. Pascal has provided to the Department of Health, Education, and Welfare, Social Security Administration, a number of SSA-1490 forms containing handwritten additions.

C. Mrs. Elizabeth Michaud, formerly employed as a laboratory technician for Doctors London and Abrams, stated to representatives of the Department of Health, Education, and Welfare that tests that were neither performed by the office or BIORAN (an outside laboratory) were added to the bill.

Mrs. Michaud also said that Doctors London and Abrams exaggerated diagnoses to justify the extensive laboratory work.

D. Mrs. Constance L. Coleman, formerly employed as a secretary-receptionist for Doctors London and Abrams, was responsible for, among other things, completing billing forms such as the medicare forms. In an affidavit to the Department of Health, Education, and Welfare, Mrs.

Coleman stated that she completed medicare forms using the information recorded on the billing cards which the doctor completed in conjunction with the medical histories. She was instructed to list on the medicare claim form all the services that were listed on these cards. Mrs. Coleman also stated that after the medicare forms were typed she sent the form to the doctors for their signatures and that frequently these forms were returned with lab tests added. She was also told to add the additional tests to the billing cards but as far as she knew the medical records were never changed to reflect these additional tests.

Mrs. Coleman further states that these tests that were added to the claims forms were not performed according to the medical history and that during her employment there she checked the medical records for laboratory results on a number of beneficiaries and found about 50 incidents where the doctors were billing for laboratory tests that were not performed.

E. On September 29, 1976, the Bureau of Health Insurance received a letter from Dorothy Gordon, a medicare beneficiary, in which she stated that she never received services from Dr. Peter Braun, M.D., who is an associate of Drs. Abrams and London. Mrs. Gordon states that she was at the office of Abrams, London and Associates in May of 1976 where she saw Dr. London for a vaccination and cholera shot and that she was never Dr. Braun's patient and the statement (SSA-1490) is not true.

F. A form SSA-1490 was received by Massachusetts Blue Cross, as agent for the Social Security Administration, seeking request for medicare payment for the patient, Dorothy Gordon, for services rendered on August 10, 1976, indicating a number of laboratory tests done in the office lab for a fever and cough and urinary tract infection and seeking payment in the amount of Seventy-five ($75) Dollars and signed by Peter Braun, M.D.

On April 20, 1977, I personally viewed the building located at 25 Boylston Street (Rte. 9) Newton, Massachusetts, said building being physically located on the Newton-Brookline line and bearing a sign "Chestnut Hill Medical Center".

For the foregoing reasons, I have probable cause to believe that there is presently concealed within those premises more particularly described as the Professional Offices of Doctors Maurice Abrams, Abraham London, Peter Braun, and Abrams, London and Associates, Inc., which are contained within a three-story red brick building located at 25 Boylston Street (Rte. 9) Newton MA, said building being physically located on the Newton-Brookline line and bearing a sign "Chestnut Hill Medical Center", certain business, billing and medical records of patients of Doctors Abrams, London, Braun, and Abrams, London and Associates, Inc. which show actual medical services performed and fraudulent services claimed to have been performed in a scheme to defraud the United States and to submit false medicare and medicaid claims to the United States or its agents, in violation of Title 18, United States Code, Section 1001.

(s) PAUL M. CONRAD
Special Agent
Federal Bureau of Investigation

Subscribed and sworn to before me on this 20th day of April, 1977.

(s) LAWRENCE P. COHEN
United States Magistrate

Search Warrant

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA,

vs.

Docket No. 77-04451-01

Case No.

The Professional Offices of Doctors Maurice Abrams, Abraham London, Peter Braun, and Abrams, London and Associates, Inc., which are contained within a three-story red brick building located at 25 Boylston Street (Rte. 9) Newton MA, said building behing physically located on the Newton-Brookline line and bearing a sign "Chestnut Hill Medical Center"

SEARCH WARRANT
(Filed: April 20, 1977)

TO: Any U.S. Marshal or his deputies, any special agent of the FBI, or any other authorized person:

Affidavit having been made before me by Paul M. Conrad, Special Agent, Federal Bureau of Investigation that he has reason to believe that (on the premises known as) the Professional Offices of Doctors Maurice Abrams, Abraham London, Peter Braun, and Abrams, London and Associates, Inc., which are contained within a three-story red brick building located at 25 Boylston Street (Rte. 9) Newton MA, said building being physically located on the Newton-Brookline line and bearing a sign "Chestnut Hill Medical Center", in the District of Massachusetts there is now being concealed certain property, namely evidence of a crime, to wit: certain business and billing and medical records of patients of Doctors Abrams, London, Braun, and Abrams, London and

Associates, Inc. which show actual medical services performed and fraudulent services claimed to have been performed in a scheme to defraud the United States and to submit false medicare and medicaid claims for payments to the United States or its agents; in violation of Title 18, United States Code, Section 1001, and as I am satisfied that there is probable cause to believe that the property so described is being concealed on the person or premises above described and that grounds for application for issuance of the search warrant exist as stated in the supporting affidavit.

You are hereby commanded to search within a period of ten days (not to exceed 10 days) the place named for the property specified, serving this warrant and making the search in the daytime (6:00 a.m. to 10:00 p.m.) and if the property be found there to seize it, leaving a copy of this warrant and receipt for the property taken, and prepare a written inventory of the property seized and promptly return this warrant and bring the property before Federal Magistrate as required by law.

Dated this 20th day of April, 1977.

(s) Lawrence P. Cohen
Federal Magistrate

Return on Search Warrant

RETURN

I received the attached search warrant 4/20, 1977, and have executed it as follows:

On 4/20, 1977 at 2:40 o'clock P.M. I searched the person or premises described in the warrant and

I left a copy of the warrant with Maurice I. Abrams, M.D. 25 Boylston St., Newton, MA together with a receipt for the items seized.

The following is an inventory of property taken pursuant to the warrant:

Abercrombie to Betts	Box	1. 58 charts
Biller to Clickstein		2. 57 charts
F. Levy To P. Morrison		3. 58 charts
Goldbert-Hurwitz		4. 65 charts
A. Cohen-Dowdall		5. 51 charts
Dubrow-WM Gold		6. 56 charts
S. Jacobs-M. Landee		7. 36 charts
D. Langbort-Levy		8. 28 charts
A. Seletz-Sadie Silver		9. 49 charts
G. Morse-Wm Riley		10. 52 charts
Weiner-Zollotto		11. 32 charts
N. Robins-Siegal		12. 51 charts
Adler-Mazzin (inactive)		13. 99 charts
Milden-Ziskin (inactive)		14. 63 charts
Riley to Ober also in Box 14		
Soble to Weinfeld		15. 52 charts
Medicare Books		18. BOOKS
Bass-Greenman		16. 30 charts (loose files)

17 Boxes 855 Charts

This is to certify that on April 20, 1977 at 25 Boylston Street, Chestnut Hill, Massachusetts, Special Agents of the

Return on Search Warrant

Federal Bureau of Investigation, United States Department of Justice, at the time of conducting a search of the premises at 25 Boylston Street, Chestnut Hill, Massachusetts, obtained the above listed items. I further certify that the above represents all that was obtained by Special Agents of the Federal Bureau of Investigation, United States Department of Justice.

(s) MAURICE I. ABRAMS 4/20/77

Witnesses:
(s) PAUL M. CONRAD 4/20/77
Special Agent, FBI, U. S. Dept. of Justice
(s) JOSEPH L. DeBIAGGIO 4/20/77
Special Agent, FBI, U. S. Dept. of Justice

This inventory was made in the presence of
and .

I swear that this Inventory is a true and detailed account of all the property taken by me on the warrant.

(s) PAUL M. CONRAD
SA FBI

Subscribed and sworn to and returned before me this 22nd day of April, 1977

(s) LAWRENCE P. COHEN
Federal Magistrate

FOURTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

TITLE 18 U.S.C. §2(a)

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

TITLE 18 U.S.C. §287

Whoever makes or presents to any person or officer in the civil, military, or naval service of the United States, or to any department or agency thereof, any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

TITLE 18 U.S.C. §1001

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

TITLE 18 U.S.C. §1341

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

FEDERAL RULES OF CRIMINAL PROCEDURE 41(e)

(e) MOTIONS FOR RETURN OF PROPERTY. A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property on the ground that he is entitled to lawful possession of the property which was illegally seized. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored and it shall not be admissible in evidence at any hearing or trial. If a motion for return of property is made or comes on for hearing in the district of trial after an indictment or information is filed, it shall be treated also as a motion to suppress under Rule 12.

Office-Supreme Court, U.S.
FILED
SEP 1 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-8

In the Supreme Court of the United States

OCTOBER TERM, 1980

DOROTHY BROWN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

GLORIA C. PHARES
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the warrant authorizing a search of the office of petitioner's husband described the things to be seized with the particularity required by the Fourth Amendment.

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In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 81-8

DOROTHY BROWN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The judgment order of the court of appeals (Pet. App. 1a) is unreported. The opinions of the district court (Pet. App. 11a-14a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 5, 1981, and the petition for a writ of certiorari was filed on July 1, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Following a jury trial in the United States District Court for the Western District of Michigan, petitioner was convicted on 18 counts of presenting false Medicaid claims, in violation of 18 U.S.C. 287; six counts of making false statements in a matter within the jurisdiction of the United States, in violation of 18 U.S.C. 1001; and six counts of mail

fraud, in violation of 18 U.S.C. 1341 (Pet. App. 23a-40a, 50a). Petitioner's husband, Dr. William J. Brown, stood trial with her on the same 50-count indictment but was acquitted on all counts. Petitioner was fined $3,000 and sentenced to a one-year term of imprisonment, which was suspended in favor of two years' probation (*id.* at 50a).

2. The issue raised by petitioner concerns a search warrant that authorized a search of Dr. Brown's office for

> records, books and accounts pertaining to the following:
>
> Patient Medical Charts
> Daily Log sheets—"Day Sheets"
> Patient ledger sheets
> Insurance claim forms
>
> which are in violation of Title 18, United States Code, Section 1001

(Pet. App. 20a).

The search warrant was based upon the affidavit (Pet. App. 17a-19a) of Deirdre Flannery, an HEW program integrity officer. The affidavit recorded the reports of three of Dr. Brown's patients, who complained that Medicare had been billed for services they had not received (*id.* at 18a, 19a). Two former billing clerks reported that Mrs. Brown directed them to prepare false Medicare claims (*id.* at 18a). One of them also stated that Mrs. Brown, in response to an upcoming Blue Shield audit, rewrote all the files and concealed the originals (*ibid.*).

Before the warrant was executed, Flannery showed the agents who assisted her what the relevant insurance and medical forms looked like (Pet. App. 66a-67a). Approximately 1,676 patient files were seized, each of which apparently contained forms falling into one or more of the four categories listed in the warrant (*id.* at 13a). Not all the files,

however, concerned patients for whom payment was sought under Medicare or Medicaid, and many of the files contained documents in addition to those specified in the warrant (*id.* at 14a). In the two months after the search, Flannery reviewed the files and returned those not pertinent to the investigation (*id.* at 69a-70a). In the meantime, Dr. Brown was provided with copies of all files that remained in federal custody (*id.* at 43a, 69a).

3. Before an indictment was returned, Dr. Brown moved unsuccessfully under Fed. R. Crim. P 41 for the return of the seized property and the suppression of evidence. The district court rejected his argument that the warrant lacked the particularity required by the Fourth Amendment and stated that the warrant "explicitly identified the items sought, and was limited to those records relevant to the Medicare issue" (Pet. App. 6a-7a).

After the indictment was filed, petitioner and Dr. Brown[1] again moved for return of the seized property and suppression of evidence. The district court judge to whom the criminal case had been assigned adopted the previous judge's opinion and denied the motion (Pet. App. 10a). The court also denied a mid-trial motion for reconsideration based upon *United States* v. *Abrams*, 615 F. 2d 541 (1st Cir. 1980), stating that the *Abrams* warrant lacked the "saving particularity" of the warrant in this case (Pet. App. 12a). The court did, however, exclude two categories of evidence the seizure of which was not authorized by the search warrant: documents not falling within the four classes listed in the warrant and documents from files containing no indication of federal involvement that would make 18 U.S.C. 1001 applicable (Pet. App. 4a).

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[1]Neither at trial nor on appeal did the government contend that petitioner's own Fourth Amendment rights were not implicated by the search of her husband's office.

4. The court of appeals affirmed petitioner's conviction by judgment order with one judge dissenting. The judgment order stated that the court found the search warrant "sufficiently specific in its description of the things to be seized" (*id.* at 1a).

ARGUMENT

Petitioner contends (Pet. 5-19) that the judgment of the court of appeals is in conflict with decisions of other circuits and with decisions of this Court. In fact, however, there is no conflict among the circuits, and the issue she asks the Court to review entails little more than the application of generally agreed legal principles to the specific facts of her case. There is thus no occasion for further review by this Court.

1. There is no conflict between the decision below and the decisions of other circuits upon which petitioner relies. Those cases involved less specifically worded search warrants, and the decisions turned upon the precise wording of the warrants.

Petitioner places principal reliance upon *United States* v. *Abrams*, 615 F. 2d 541 (1st Cir. 1980), a prosecution for Medicaid fraud with superficial factual similarities to the present case. In *Abrams*, however, the warrant contained "no description as to what specific records [were] to be seized" but instead authorized the seizure of all "business and billing and medical records * * * which show actual medical services performed and fraudulent services claimed to have been performed in a scheme to defraud the United States * * *." *Id.* at 542, 543. The warrant here, by contrast, listed the four categories of relevant records.

The other cases upon which petitioner relies are also readily distinguishable. In *Application of Lafayette Academy Inc.*, 610 F. 2d 1 (1st Cir. 1979), "[t]he warrant

[was] framed to allow seizure of most every sort of book or paper at the described premises, limited only by the qualification that the seized item be evidence of violations of [certain statutes which] penalize a very wide range of frauds and conspiracies." *Id.* at 3.

In three other cases upon which petitioner relies (Pet. 11, 14)—*Montilla Records of Puerto Rico, Inc.* v. *Morales*, 575 F. 2d 324 (1st Cir. 1978); *United States* v. *Klein*, 565 F. 2d 183 (1st Cir. 1977); and *United States* v. *Drebin*, 557 F. 2d 1316 (9th Cir. 1977), cert. denied, 436 U.S. 904 (1978)—the warrants instructed the executing officers to take items produced in violation of copyright laws, but the warrants provided no safeguards to insure that the executing officer would be able to differentiate an illegally produced item from one manufactured lawfully.

Similarly, in *United States* v. *Marti*, 421 F. 2d 1263 (2d Cir. 1970), the court struck down a warrant that directed the seizure of obscene materials but failed to provide any further guidance to the executing officer.

In two of the cases cited by the petitioner, warrants were found deficient because the class of items listed for seizure exceeded the scope of the showing of probable cause. In *VonderAhe* v. *Howland*, 508 F. 2d 364 (9th Cir. 1974), there was probable cause to seize certain records contained on yellow sheets and green cards, but the warrant sanctioned the seizure of a larger category of documents.[2] And in *United States* v. *Roche*, 614 F. 2d 6 (1st Cir. 1980), there was probable cause to seize documents relating to motor vehicle insurance, but the warrant "authorized the seizure

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[2]The court suppressed only those records not contained on yellow sheets and green cards.

of a far broader class of documents pertaining to all types of insurance."[3] *Id.* at 7.

2. Petitioner also maintains (Pet. 16-19) that the decision in this case conflicts with decisions of this Court, but her argument is erroneous. She contends that the warrant violated long-established precedent by "[leaving] it up to the executing officers to determine which documents violated the law and should be seized" (Pet. 17). As noted, however, the warrant listed the four particular categories of documents to be seized.

She also claims that the decision below is inconsistent with *Marcus* v. *Search Warrants*, 367 U.S. 717 (1961). That case held that due process was violated by a state procedure that authorized the issuance, upon complaint, of a warrant to search for "obscene" materials. The resulting warrants left it almost entirely to the discretion of the executing officers to determine which materials were obscene. *Id.* at 732. There is no similarity between those warrants and the particularized warrant in this case.

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[3] *Pieper* v. *United States*, 604 F. 2d 1131 (8th Cir. 1979), cited by petitioner (Pet. 15), is inapposite. The only issue on appeal was whether the district court had correctly refused to exercise its equitable jurisdiction to entertain a motion to quash a search warrant and suppress seized evidence. Because Pieper could challenge the subpoena in the administrative action brought subsequent to the search, the district court held that he had an adequate remedy at law and refused to exercise jurisdiction. The court of appeals affirmed. 604 F. 2d at 1134.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1981

DOJ-1981-08